

Report of Investigation

28 June 2000

Subj: SENIOR OFFICIAL CASE 990966; MANIPULATION OF THE FEDERAL RETIREMENT SYSTEM ICO MR. CHARLES P. NEMFAKOS, SES-6; DR. DANIEL A. NUSSBAUM, FORMER SES-3; MR. ROBERT PANEK, SES-6; MS. SHERYL M. MCNAIR, FORMER SES-4; AND MS. BETTY WELCH, SES-5, TO CONFER UNENTITLED BENEFITS IN EXCESS OF ONE MILLION DOLLARS.

Preliminary Statement

1. On 29 November 1999, a confidential complainant alleged to the Naval Inspector General (NAVINSGEN) that Mr. Charles Nemfakos, Acting Assistant Secretary of the Navy (Financial Management and Comptroller)(ASN (FM&C)), and his subordinate, Dr. Daniel Nussbaum, Director, Naval Center for Cost Analysis (NCCA), were manipulating the civilian personnel management system to make Dr. Nussbaum eligible for a Discontinued Service Retirement (DSR). He could then retire with an immediate pension and retired medical insurance, benefits to which he would not otherwise be entitled. [Ref (a)]
2. Our initial inquiry identified a second questionable retirement involving Ms. Sheryl McNair, former Director of the Investment and Development Division (FMB-2), ASN (FM&C), that had been accomplished under circumstances similar to those contemplated for Dr. Nussbaum. Accordingly, we also investigated Ms. McNair's retirement. [Ref (b)]
3. The scope of investigation consisted of taped, sworn testimony of personnel within, and professionally associated with, the ASN (FM&C) organization, as well as personnel management experts within Navy, OSD, and OPM. Documentation reviewed included Official Personnel Files, Personnel Actions, applicable regulations, special project data, internal memoranda, and e-mail. All documentation is on file at NAVINSGEN. All documents and interviews referred to in the text are listed as references at the end of the report.
4. To provide a quick reference to the sequence of events surrounding each allegation, brief chronologies in the cases of Ms. McNair and Dr. Nussbaum are provided as enclosures (1) and (2), respectively. Since the issues in both cases are nearly identical, we have consolidated the discussion of applicable standards, analysis, and conclusions. To assist the reader, we discuss the applicable standards in the background section and provide a separate summary of findings.

Background¹

-Civil Service Retirement System-

5. Most federal employees are covered by the Civil Service Retirement System (CSRS), Title 5, United States Code (USC), Chapter 83, or the Federal Employees' Retirement System (FERS), Title 5, USC, Chapter 84. By law, the Office of Personnel Management (OPM) administers both systems (5 USCS §§ 8347 and 8461). Since Ms. McNair and Dr. Nussbaum were in the CSRS, we address only provisions relating to that system.

¹ The various statutes, regulations, etc., cited in this section are recapped in a separate Applicable Standards section preceding our analysis of the findings of the case.

6. Under 5 USCS § 8347, OPM has authority to issue such regulations, and perform such acts, as it deems necessary and proper to carry out the retirement statutes (5 USCS §§ 8331-51). In order to receive retirement benefits, federal employees must apply to OPM using such forms as OPM may specify. Their agencies must submit such supporting "certificates as [OPM] considers necessary to the determination of the rights of applicants." OPM then adjudicates the application (5 USCS § 8347(b)). The employee may appeal adverse OPM retirement decisions to the Merit Systems Protection Board (MSPB).

-Discontinued Service Retirements-

7. The rules for "immediate retirement" appear at 5 USCS § 8336. Under the provisions of that statute, an employee can retire with an immediate annuity if he or she has *both* reached age 55 and completed 30 years of service *before* separation for retirement. Other combinations of age and service qualifying for immediate annuity are: age 60 with 20 years of service; and age 62 with 5 years of service (5 USCS § 8336(a)-(c)).

8. Under certain circumstances, an early retirement benefit is available to an employee who is involuntarily separated for reasons not involving charges of "misconduct or delinquency," such as abolishment of the employee's position (5 USCS § 8336(d)). Eligibility for this immediate annuity benefit, referred to as a Discontinued Service Retirement (DSR), is based on age and years of service, as follows: age 50 with 20 years of service; and any age with 25 years of service. If, however, the employee declines a reasonable agency offer of another position within the commuting area that is not lower than 2 grades below the employee's grade, the employee loses eligibility for the DSR. An employee who does receive a DSR also is eligible for retired Government health insurance benefits.

9. A member of the SES who is removed from the SES for less than fully successful executive performance after completing 25 years of service (20 years if the member is 50 years old), also is entitled to a DSR annuity (5 USCS § 8336(h)(1)).

10. An employee who voluntarily leaves Government service before qualifying for an immediate retirement may be eligible for a deferred annuity, if he or she has at least 5 years of creditable service, upon reaching age 62. An employee who leaves Government service short of retirement may not retain Government health insurance benefits, nor does that person become eligible for retired Government health insurance benefits upon reaching eligibility for a deferred annuity.

11. Regulations issued by OPM to implement the laws relating to civil service appear in Title 5 of the Code of Federal Regulations (CFR). The rules concerning the offer of another position under 5 USCS § 8336(d) are discussed at 5 CFR § 831, but there are no provisions in the CFR that discuss the meaning of the term "involuntary" that appears in the statute. However, OPM has placed information on the OPM website, available to anyone who has access to the internet, that explains how the Federal Retirement System works and how OPM interprets statutory provisions, such as those applicable to a DSR.

12. The key to DSR eligibility is the statutory requirement that the qualifying personnel transaction be involuntary in nature. OPM website publications emphasize that whether a separation is voluntary or involuntary depends on all of the facts in a particular case, i.e., an employee cannot voluntarily agree to an involuntary separation to obtain eligibility for a DSR.²

² It should be noted that OPM Guidelines are directive in nature and that Government agencies are not free to disregard them or to make their own interpretations. They represent OPM's official interpretation of underlying statutes with which the Navy must comply.

13. OPM's CSRS/FERS Handbook for Personnel and Payroll Offices is available on the OPM website.

a. Chapter 44 is titled "Discontinued Service Retirement." Section 44A1.1-1 sets forth the following overview of DSRs:

A discontinued service or involuntary retirement provides an immediate, possibly reduced, annuity for employees who are separated against their will...The final responsibility for determining whether a separation is involuntary for discontinued service annuity purposes rests with OPM. Whether a separation is voluntary depends on all the facts in a particular case; it is the true substance of the action that governs, rather than the methods followed or the terminology used.

....

To curb the potential for abuse of discontinued service retirement, each agency should have internal controls that are sufficient to prevent abuses. Agency procedures should contain appropriate checks and balances, such as requiring that all personnel actions that can lead to involuntary separations for retirement purposes (for example, geographic reassignments and abolishment of positions) be independently approved by two individuals who are not in the same line of authority. Such controls increase employee confidence in the integrity of the personnel process.

b. Section 44A2.1-8 sets forth the following General Rule:

A separation is not qualifying for DSR if the employee voluntarily leaves regular long-term (career) employment to accept a short-term appointment with full knowledge of its early termination.

c. Section 44A4.1-1 also states that OPM is the final authority for DSR determinations:

A. General. The final responsibility for determining whether a separation is involuntary for discontinued service retirement purposes rests with OPM.

14. OPM's Guidelines for Settlement of Federal Personnel Actions also appears on the OPM website. The discussion under General Principal #3 states:³

...Under both CSRS and FERS, an employee can retire with an immediate annuity at age 55 if he or she has reached *both* age 55 and completed 30 years of service *before* separation for retirement. A settlement cannot legally provide that an employee who separated at age 53 with 30 years of service will begin to receive an annuity commencing at age 55. Under both CSRS and FERS, such individual may receive only a deferred annuity commencing at age 62.

...Under both FERS and CSRS, an employee who has been involuntarily separated for reasons not involving charges of "misconduct or delinquency" after reaching age 50 and completing 20 years of service, or after completing 25 years of service regardless of age, is entitled to an immediate annuity referred to as a Discontinued Service Retirement (DSR).

...Because OPM may approve a DSR only where an involuntary separation is involved, OPM will not approve a DSR application that is based on a separation that has been *voluntarily arranged*. That is, an employee and an agency cannot *agree* to create a scenario in which the agency prepares a personnel action purporting to reflect an involuntary separation on grounds not involving charges of misconduct or delinquency, with the intent that the facially involuntary, but actually voluntary, separation be used by the employee as the basis for an application to OPM for DSR. DSR

³ OPM has recently revised the language of this section, because it has determined that there are circumstances under which an agency and employee may agree to a settlement in which a proposed misconduct separation can be changed to a DSR-qualifying separation, if the agency believes the misconduct separation would be overturned by a court or administrative body. However, for purposes of this case, which does not involve misconduct or settlement agreements, the original guidance remains germane.

requirements under CSRS and FERS mandate that an *involuntary* separation have occurred. An individual cannot voluntarily agree to an involuntary separation to obtain bogus eligibility for DSR.

15. OPM requires that agencies submit DSR certifications on a Standard Form (SF) 1150. In Hathaway v. GSA, MSPB Docket No. DA-0752-92-0689-I-1, 12 March 1993, the trial judge found that Hathaway, a GM-15 Director of Personnel, knowingly and willingly participated in making false representations to OPM by signing an SF 1150 certifying that the separated employee had been offered a position outside the commuting area, when he knew GSA had not made the offer. In connection with another DSR, the trial judge declined to find the SF 1150 itself constituted a false certification, but found the DSR was improper, because Hathaway secured the employee's consent to seek a DSR rather than face the consequences of poor performance. The trial judge, and MSPB on petition for review, sustained GSA's decision to remove Hathaway.⁴

16. An employee who voluntarily leaves Government service before qualifying for an immediate annuity may be eligible for a deferred annuity, if he or she has at least 5 years of creditable service, upon reaching age 62. An employee who leaves Government service short of retirement may not retain Government health insurance benefits, nor does that person become eligible for retired Government health insurance benefits upon reaching eligibility for a deferred annuity.

-Other Standards-

17. 5 USCS § 2301 (Merit System Principles) states:

(b) Federal personnel management should be implemented consistent with the following merit system principles:

...

(4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.

(5) The Federal work force should be used efficiently and effectively.

18. Section 2635.702 of the Joint Ethics Regulation (JER), DOD 5500.7-R, "Use of Public Office for Private Gain," states:

(a) An employee shall not use or permit the use of his Government position or title or any authority associated with his public office in a manner that is intended to coerce or induce another person, including a subordinate, to provide any benefit, financial or otherwise, to himself or to friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity.

19. Section 6, Chapter 12, of the JER sets forth an ethical decision making plan, stating:

The following plan for decision-making ensures careful review of ethical consequences when there are alternative solutions that seem proper under existing laws and regulations. DOD employees should consider incorporating the following plan in official decision-making....

d. Eliminate Unethical Options. There may be solutions that seem to resolve the problem and reach the goal but which are clearly unethical. Remember that short term solutions are not worth sacrificing our commitment to ethics. The long term problems of unethical solutions will not be worth the short term advantages. Eliminate the unethical solutions.

⁴ An OPM summary of the Hathaway trial judge's decision is contained in reference (oo). MSPB denied the petition for review in a table decision, and there is no published record of the trial judge's opinion.

Summary of Findings

20. Ms. Sheryl McNair, the SES-4 Director of the Investment and Development Division (FMB-2), ASN (FM&C), and Dr. Daniel Nussbaum, the SES-3 Director of the Naval Center for Cost Analysis (NCCA), each participated with senior Navy officials in manipulating the civilian personnel system to make them eligible for retirement benefits, amounting to over \$1 million (the total for both cases), to which they were not rightfully entitled. The only substantial difference was that the DSR was accomplished in Ms. McNair's case and not accomplished in Dr. Nussbaum's case.

21. In the early months of 1999, Ms. McNair and Dr. Nussbaum were thinking about leaving their positions in the Federal Government. Ms. McNair wanted to spend more time at home with her children. Dr. Nussbaum wanted to enter the private sector, and he gave counsel a disqualification memo indicating that he might negotiate with Booz-Allen & Hamilton. However, neither qualified for immediate retirement benefits.

22. In the Summer of 1999, Dr. Nussbaum articulated to Mr. Nemfakos and other senior officials his desire to leave Government employment to accept a position with Booz-Allen & Hamilton, while retaining retired Government health insurance benefits. In order to facilitate Dr. Nussbaum's request, Mr. Nemfakos agreed to create a GS-15 advisory position to which Dr. Nussbaum would be assigned, after voluntarily requesting a downgrade from his SES position. The GS-15 position would then be abolished, making him eligible for DSR benefits, including an immediate annuity and retired health insurance. At the time of his proposed DSR, Dr. Nussbaum was 55 years old, but had only 20 years of service. Thus, while he met age and years of service requirements for a DSR, he would have had to continue working until age 60 to be eligible for immediate retirement. If he left Government service without a DSR, he would not have been eligible for a deferred annuity until reaching age 62 and never would have qualified for health insurance.

23. At the outset of our investigation, we determined that although Mr. Nemfakos' requests to downgrade and retire Dr. Nussbaum had been processed, they had not yet received final endorsement and implementation by the Human Resources Service Center (HRSC) at Nebraska Avenue. At NAVINSGEN's request, the Secretariat Headquarters Human Resources Office (SHHRO) placed a hold on the actions, pending investigation. On 10 December 1999, prior to completion of the investigation, Dr. Nussbaum resigned from Government service as an SES. The fact that he did not leave under a DSR did not nullify possible wrongdoing and therefore did not preclude our continued investigation into the matter.

24. Circumstances similar to those outlined above also surrounded the retirement of Ms. McNair. In her case, Mr. Robert Panek, Associate Director, Office of Budget/Fiscal Management (FMB), ASN (FM&C), created a GS-15 advisory position to which Ms. McNair was assigned, after voluntarily requesting a downgrade from her SES position. At the time, Ms. McNair was age 45 and had 24 years and 9 months of Government service. Mr. Panek abolished the position 3 months later, when Ms. McNair met the "any age with 25 years of service" eligibility criteria for a DSR. She received a DSR in October 1999. Had she not received a DSR, she would have had to continue working until age 55 to be eligible for an immediate retirement. If she had left Government service without a DSR, she would not have been eligible for a deferred annuity until reaching age 62.

25. The evidence shows that both Ms. McNair's downgrade and Dr. Nussbaum's proposed downgrade from SES to GS positions were voluntary and that they were entered into with an expectation that their GS positions would be abolished for the purpose of making them eligible for a DSR. Thus, given OPM's guidelines, that an employee cannot voluntarily agree to an involuntary separation (abolishment of position), neither was truly eligible for a DSR.

Nonetheless, Mr. Nemfakos and Mr. Panek were aided and abetted in achieving these improper outcomes by senior Human Resources managers, including Ms. Betty Welch, Deputy Assistant Secretary of the Navy (Civilian Personnel/EEO), who continually provided erroneous advice concerning the legality of the personnel actions involved.

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26. Because the personnel actions with regard to Ms. McNair predate those in the case of Dr. Nussbaum, we will deal with the allegations arising from Ms. McNair's retirement first.

Allegation #1: That Mr. Nemfakos, Mr. Panek, and Ms. McNair improperly manipulated the retirement system, allowing Ms. McNair to receive a retirement annuity to which she was not entitled, in violation of 5 USCS § 8336; the Joint Ethics Regulation (DOD 5500.7-R); and OPM Guidelines (Settlement of Federal Personnel Actions and the CSRS/FERS Handbook for Personnel and Payroll Offices).

Findings

- Ms. McNair's Initial Interest in DSR Eligibility -

27. Please see enclosure (1) for a brief chronology concerning this allegation.

28. Ms. McNair retired under a DSR on 9 October 1999. In interview, she stated that she understood that she was eligible to retire under a DSR in June 1999. At some point, she asked (b)(6) & (b)(7)(C) Personnel Management Branch, Financial Management Administrative/Fiscal Division (FMA-1), to verify her DSR eligibility date, and (b)(6) & (b)(7)(C) told her she would be eligible in June 1999. [Ref (c); Ref (d), pp. 15-17]

29. (b)(6) & (b)(7)(C) stated that she does not remember giving Ms. McNair an eligibility date. However, (b)(6) & (b)(7)(C) routinely provides that kind of information to employees upon request, and she concedes that she may very well have done so with Ms. McNair. However, she would have given her an eligibility date based on when Ms. McNair would have had 25 years of federal service. For DSR eligibility purposes, the length of service is not impacted by annual or sick leave balances; it's strictly computed from time elapsed since the service computation date (SCD). [Ref (e)]

30. (b)(6) & (b)(7)(C) did recall that Ms. McNair requested that she "revisit" the calculation of her SCD, as Ms. McNair had taken some leave without pay early in her career. The HRSC at Nebraska Avenue recomputed the date and made the necessary change to Ms. McNair's record. Supporting documentation in her Official Personnel File (OPF) indicates a change in her SCD from 9 June 1974 to 24 September 1974, in order "to reflect excess time in nonpay status during calendar year 75." The action was approved on 1 February 1999, with an effective date of 29 January 1999. As a consequence, Ms. McNair's DSR eligibility date became 24 September 1999. Ms. McNair did not disclose to (b)(6) & (b)(7)(C) what prompted the timing of this request.⁵ [Refs (c) and (e)]

- Ms. McNair's Request to Leave Her Position and Retire Early -

31. According to Ms. McNair, while she was the Director of FMB-2, she routinely spent 3 hours a day commuting, on top of working long days, usually until 6 PM. In approximately April or May 1999, she decided not to renew the contract with her *au pair* at home. Rather, she decided it was time to stay home with her children. She discussed this matter with Mr. Panek, who told her that he really did not want her to leave, but had a project for her that she could do at

⁵ Although we do not know exactly when Ms. McNair requested recomputation of her SCD, it must have been shortly before the date of the resultant personnel action, i.e., sometime in January 1999. In interview, Ms. McNair made no reference to her adjusted retirement eligibility date and led investigators to believe that, even after she left the Government, she was still under the impression that she had been eligible to retire under a DSR in June 1999.

home. Ms. McNair stated that if something could not be worked out for her to work at home, she would have left the Government at the time she lost her *au pair*. [Ref (d), pp. 2-3; Ref (f), in entirety, but see especially pp. 9-10 and 15-16]

32. Mr. Panek recalled that in the Spring of 1999, Ms. McNair told him that she wanted to leave her position and do something less stressful. He stated: [Ref (g), p. 26]

She said that ultimately she'd like to [leave federal service] and I said, "You know, Sheryl, the only way you can do that – I mean you're not eligible to retire or anything like that. I mean you'd have to find a position that you could – that you could do that and I don't have any at this point."

33. According to Ms. McNair, she met with Mr. Nemfakos in his office to tell him that she planned to leave her SES position. She told him she wanted to leave at the end of the school year, i.e., May/June 1999 timeframe. He told her that her decision to stay home with her family was "not the best thought-out decision." To the best of her recollection, she and Mr. Nemfakos did not discuss any options or a DSR. She stated that she was not aware of whether he knew how close she was to being eligible for DSR. [Ref (d)]

34. Mr. Nemfakos recalled: [Ref (h)]

a. In late Spring 1999, upon Ms. McNair's request, he met with her in his office to discuss her desire not only to leave her SES position, but also to get an early retirement. He felt that, given her stress and the fact that she wanted a change in work environment, it was in her best interests and those of the organization to accommodate her desires. He was interested in the possibility of rotating her to another job, but many of the senior level comptroller positions were no longer in the immediate geographical area. He does not "believe" that he initiated the idea of her accepting a voluntary downgrade.

b. He then went to Mr. Panek to discuss this matter, which he described as follows: [Ref (h), p. 31]

[I]t was a proposition of an individual who had done a hell of a job for the Department for a long period of time coming to me and saying, "Help; I'm under stress; I need something, Okay?" My then going to her chain of command and saying, "Look, it sounds like we have a problem here; here are the issues as I see them; over to you; if we can help get her out of this box, it's the right human thing to do."

- Exploring A Job Swap -

35. As early as January or February of 1999, Ms. McNair told Mr. Panek that she wanted to do something different, because her SES job was "beginning to get [to be] too much for her." She expressed to him an interest in taking the position of Deputy Commander for Financial Management, Marine Corps Systems Command, Quantico, VA, which was held at that time by (b)(6)(b)(7)(C). She and Mr. Panek then went together to see Ms. Betty Welch, Deputy ASN (Civilian Personnel/EEO), and discussed what job opportunities might be available to Ms. McNair outside the ASN (FM&C) organization, to include the possibility of effecting a job swap with (b)(6)(b)(7)(C). Ms. Welch did not know of any other opportunities. In interview, Mr. Panek stated that he could not recall having had any discussion with Ms. Welch concerning creation of the GS-15 job for Ms. McNair. [Ref (i)]

36. Ms. McNair and Mr. Panek were aware that there was a possibility that (b)(6) & (b)(7)(C)' job would be moved to Albany, GA. It was for that reason that Ms. McNair was exploring the idea of a job swap. Ms. McNair knew that if she took (b)(6) & (b)(7)(C)' job and it was re-located, she would then be eligible for DSR. It was in that context that Mr. Panek was helping Ms. McNair explore the possibility of the swap. Mr. Panek asked (b)(6) & (b)(7)(C), Assistant Deputy

Commandant of the Marine Corps for Program and Resources/Fiscal Director of the Marine Corps, about the status of the (b)(6)(b)(7)(c) position. (b)(6)(b)(7)(c) told him that the Marine Corps had not yet made a decision. [Refs (g) and (j)]

37. (b)(6)(b)(7)(c) stated that in May or early June 1999, Mr. Panek told him that (b)(6)(b)(7)(c), if interested, would be the right person to take Ms. McNair's job. Mr. Panek also told him that he was looking for some way to extend Ms. McNair's time in the Government for a few months, until she was eligible "for something," and perhaps she could swap jobs with (b)(6) & (b)(7)(C) & (b)(6)(b)(7)(C). (b)(6)(b)(7)(C) rejected that idea, primarily on the basis that he didn't want to put the Marine Corps in a position of hiring Ms. McNair with the prospect of having to find another replacement shortly thereafter. [Ref (j) in entirety, but see especially pp. 19 and 21-22]

38. (b)(6)(b)(7)(c) stated that in approximately December 1998, she asked Mr. Panek whether there were any vacant Navy Comptroller (NAVCOMPT) SES positions. She told him that she was unhappy with her Marine Corps supervisor and was contemplating a job change. Mr. Panek invited her to "put her hat in the ring" for a position in Navy. [Ref (k)]

39. Although the working relationship between (b)(6) & (b)(7)(C) and her supervisor improved throughout early 1999, she was concerned about the possibility that the Marines would relocate her job to Albany, GA. She was not willing to relocate. In April or May of 1999, due to stress over the continuing uncertainty about the potential transfer of her job, she asked Ms. McNair, her (b)(6) & (b)(7)(C) and (b)(6) & (b)(7)(C), for advice. In response, Ms. McNair, confided in her about her own desire for a lifestyle change. (b)(6) & (b)(7)(C) saw the possibilities: [Ref (k) in entirety, but see especially pp. 14-15]

And I said, "Wow, you know, if you're going to do that, that could potentially be...beneficial to me if...Bob Panek was interested in bringing me back."...So discussions, you know, went on, and I did talk to Mr. Panek about..."Hey, Sheryl and I have talked; she's told me that she's interested in a lifestyle change; if she decides that she's going to do a lifestyle change, I'm interested in coming back [to Navy employment]."

40. Ms. McNair specifically discussed the prospect of a job swap with (b)(6) & (b)(7)(C). According to (b)(6) & (b)(7)(C) Ms. McNair identified a possible scenario: [Ref (k), p. 15]

Along the lines of, "Hey, you know, I'll take your job in Quantico; they'll move it to Albany, and then I can, you know, say 'no,' and I can quit," you know type-thing.

41. Concurrent to these events, Mr. Panek continued to discuss with (b)(6) & (b)(7)(C) options for her employment by the Navy Comptroller. These conversations, which were held "several times" throughout early 1999, were extensions of the inquiry (b)(6) & (b)(7)(C) initiated in December 1998. (b)(6) & (b)(7)(C) did not specifically remember exploring with Mr. Panek the concept of a job swap; however, she noted that it was "possible" they discussed it in April or May 1999. (b)(6) & (b)(7)(C) may also have shared with Mr. Panek her concerns about the potential transfer to Georgia at around the same time. [Ref (k)]

42. Although the job swap between (b)(6) & (b)(7)(C) and Ms. McNair did not take place, (b)(6) & (b)(7)(C) recalled that Ms. McNair was still intent upon leaving her position. At approximately the end of May 1999, Mr. Panek notified (b)(6) & (b)(7)(C) that Ms. McNair's SES position would soon be vacant. Ms. McNair's departure was timed so as not to disrupt the annual budget review commencing in July. On 4 July 1999, (b)(6) & (b)(7)(C) assumed Ms. McNair's former position, and Ms. McNair commenced working in a telecommuting capacity as a GS-15 special assistant to Mr. Panek. [Ref (k) in entirety, but especially see p. 25]

43. Mr. Nemfakos stated that given the imminent start of the annual budget review process, he directed Mr. Panek to determine, prior to making any accommodation for Ms. McNair, who would replace her as the division director. Mr. Nemfakos was aware of discussions about possibly swapping Ms. McNair for (b)(6) & (b)(7)(C), which he supported. He was also aware of

discussions about moving (b)(6) & (b)(7)(C) job to Georgia. He “possibly” discussed that idea with Ms. McNair, in the context of what other jobs in the area might be available to her. He recognized she would be able to retire early, if she were to decline to relocate with the job. He was also aware in the Spring of 1999 that she did not have quite enough time in federal service to be eligible for a DSR, but that she “was relatively close” to being eligible. [Ref (h) in entirety, but especially see pp. 32-33]

- Accommodating Ms. McNair -

44. Mr. Panek identified a project for Ms. McNair to do in a telecommuting capacity, relating to career development of financial managers and budget analysts. (b)(6) & (b)(7)(C) GS-15, (b)(6) & (b)(7)(C) Naval Financial Management Career Center, Pensacola, FL, previously worked the project. However, Mr. Panek opined that (b)(6) & (b)(7)(C) product was deficient, and he recommended to (b)(6) & (b)(7)(C), Principal Deputy, ASN (FM&C), that a special assistant position within the FMB be created to improve that product. [Refs (g) and (l)]

45. Mr. Panek discussed with Mr. Nemfakos his plan to create a position for Ms. McNair. Although Mr. Nemfakos’ “overall plan” was to downsize the organization, Mr. Panek wanted both to accommodate Ms. McNair and “get [the organization’s] act together on career development.” According to Mr. Panek, he did not discuss with Mr. Nemfakos a DSR for Ms. McNair, as there were no plans to abolish her job for that reason. [Ref (g), pp. 10, 32-33, and 36]

46. Mr. Panek assumes full responsibility for creating and abolishing Ms. McNair’s GS-15 position. He stated: [Ref (g), pp. 55-56]

I’m not going to...be bashful about the fact that I was trying to find something productive for [an] employee that was having some difficulties to do...It was my decision entirely...I didn’t need approval from (b)(6) & (b)(7)(C) or Mr. Nemfakos. I did consult with them about what my idea was and what my plans were, but it was my decision entirely.

47. Mr. Nemfakos stated that although he did not see the position description (PD), he approved creation of a GS-15 position for Ms. McNair as an exception to the ASN (FM&C) organizational “freeze” then in effect. He knew that it supported “the reshaping of budget analyst preparation, elevation of recruiting, training, how the jobs were structured in that area.” Those were efforts that he and (b)(6) & (b)(7)(C) had been “very aggressively pursuing,” and so (b)(6) & (b)(7)(C) wound up supervising Ms. McNair in that work. [Ref (h) in entirety, but see especially pp. 27-28]

48. As described above, in approximately May 1999, Mr. Panek started the process of filling Ms. McNair’s SES position and recruited (b)(6) & (b)(7)(C) who had previously worked for FMB. [Ref (g)]

49. By memorandum to Mr. Panek of 21 June 1999, Ms. McNair announced that effective 4 July 1999, she was voluntarily leaving her SES position and accepting a position as his Special Assistant, GS-560-15/10. On 22 June 1999, Mr. Panek classified that position, which is described, in part, as follows: [Ref (m)]

The Special Assistant is responsible for specific projects assigned by FMBB/N82B necessary to provide top level continuity for Departmental budget administration; provide executive leadership and guidance for overall day-to-day budget activities of the Department, including both operational and long-range programs; and, pioneer new and sophisticated concepts, procedures and systems in the formulation, presentation and execution of budgetary requirements.

50. Mr. Panek elaborated on the specific tasking he gave Ms. McNair as his Special Assistant: [Ref (g), p. 36]

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To produce a matrix that we could use to guide training and development of budgetary personnel, essentially budget analysts, throughout the department, in the sense of professional development, on the job training and classroom training at various stages of their career...put together a structured program of what competencies we're expecting [at] various grade levels, various ranges of grade level....

51. On or about 22 June 1999, (b)(6) & (b)(7)(C), Director, FMB, signed the Request for Personnel Action (Form SF-52) authorizing Ms. McNair's conversion from SES to GS-15/10. [Ref (n)]

52. At some point, Mr. Panek told Ms. McNair that he did not know how long her special assistant job would last, because an ASN (FM&C) reorganization was underway.⁶ When the reorganization provided him with budget policy personnel who could perform her special assistant duties, he discussed with her the possibility of allowing her a DSR. [Ref (g), pp. 29-30]

53. (b)(6) & (b)(7)(C) Ms. McNair's friend and protégé, stated that Ms. McNair knew when she accepted the telecommuting assignment that the job would end in September or October 1999. (b)(6) & (b)(7)(C) did not know how the termination date was determined, but speculated that Ms. McNair and Mr. Panek had worked out a schedule for completion of the projects. [Ref (k), pp. 34-35]

54. Mr. Panek stated that when Ms. McNair began her telecommuting job (on 4 July 1999), he was aware of the date on which she would have 25 years of federal service and thereby become eligible for DSR. He mentally projected the completion of her work on the core competencies to coincide with that date of eligibility. He also acknowledged that, if he had not been interested in accommodating Ms. McNair, the core competency project could have been absorbed by other personnel within ASN (FM&C). In his words, it would have been "doable but difficult." [Ref (i), p. 13]

55. Mr. Nemfakos conceded that during a conversation with Ms. Welch, he may have addressed the possibility of Ms. McNair's prospective DSR: [Ref (h), p. 30]

[I]t would not be something unusual for me to say to her [Ms. Welch], "Oh, by the way, what she [Ms. McNair] really wants to do is quit."...I probably would have said, "That's one of the things that, you know, is an element in what we're doing."

56. Ms. Welch did not recall any discussion with Mr. Nemfakos about Ms. McNair, but remembered Mr. Panek approaching her "a long time ago." He asked her about Ms. McNair's options for an "early-out," but at that time Ms. McNair did not have the necessary 25 years of federal service to make her eligible for a DSR. Ms. Welch heard no more about the issue, until Dr. Nussbaum cited Ms. McNair as a precedent for his own situation. [Ref (o)]

57. Mr. Nemfakos provided further perspective, as follows: [Ref (h)]

a. He did not discuss with Ms. McNair the duration of the project assigned to her in her GS-15 position, but was under the impression that it would last approximately six months. It was clear in his mind that the job was temporary, and Ms. McNair was the most well-suited budget person within ASN (FM&C) to do it. Moreover, there was nobody else available to do the job on a full time basis, and as "it was a start-up effort to get something going, it required somebody full-time." [Ref (h), p. 37]

⁶ This was in contrast to Ms. McNair's testimony that she was unaware of any possible impact the reorganization would have on her telecommuting job.

b. He does not know whether management set up Ms. McNair's GS-15 job in the context of duration, i.e., with a plan to abolish it shortly after she became eligible for a DSR, or whether the timing of that action was coincidental. The "key," as far as he was concerned, was whether management got "from that position what [they] expected to get, recognizing that it was a temporary position." His impression was that they did. He had no advance knowledge of management's plan to accommodate Ms. McNair by allowing her to telecommute. [Ref (h), pp. 34-35]

- Abolishing the Special Assistant Position -

58. According to Ms. McNair, Mr. Panek told her that the duration of the special assistant job would last as long as they were both happy with what she was doing in the job. Although she was aware of a reorganization within ASN (FM&C), she did not know that the resultant shuffle of employees into Mr. Panek's division would impact her special assistant position. Mr. Panek told her that with the reorganization he no longer needed her to do the job.⁷ [Ref (f), p. 10]

59. On Friday, 24 September 1999, Ms. McNair completed 25 years of federal service, making her eligible for DSR in the event that her job was abolished. The next workday, Monday, 27 September 1999, Mr. Panek initiated action to abolish her position, effective 9 October 99, the end of that pay period. In a letter of 27 September 1999, the Director, SHHRO notified her that her position would be abolished no later than 30 November 1999. [Ref (p)]

60. At the time she received SHHRO's 27 September letter, or shortly before, Ms. McNair told Mr. Panek she wanted to leave her position as soon as possible. Her reason for wanting to leave so quickly was that she was not happy doing the special assistant work for him. She characterized it as "a painful type ...of work...doing a lot of stuff that [she] wasn't used to doing." However, prior to learning that her job was going to be abolished, she had not expressed her unhappiness to him, because: [Ref (d), pp. 10-11]

[H]e [had been] nice enough to come up with that [telecommuting position] as a way for [her] to handle [her] problems, and [she] wasn't going to look a gift horse in the mouth."

- Perspective of Director, FMB -

61. Several months prior to the time Ms. McNair started telecommuting, a senior official told (b)(6) & (b)(7)(C) that she had announced her intention to retire and be a "full-time mom." The fact that she wanted to retire came as a complete surprise to (b)(6) & (b)(7)(C), since at that time, "she didn't have enough years in to draw retirement right away," although he knew she was eligible for a deferred annuity. He was aware that she had been considering taking a job in Quantico: [Ref (n), p. 8 of 19 Jan 00]

There was one event that I'm aware of, and that was tied to the fact that she couldn't retire, not eligible for full retirement. And that was some discussion that she might go down and take (b)(6) & (b)(7)(C) job in Quantico. (b)(6) & (b)(7)(C) is the one who replaced her here; she did something with the Marine Acquisition Command. I mean the idea being that Sheryl [McNair] would take that job and (b)(6) & (b)(7)(C) would come here, hoping that that command might move to Atlanta, move out of the area, which would allow her to retire early.

⁷ Noteworthy is the fact that Mr. Panek met his target date for implementing the reorganization within ASN (FM&C) by 1 July 1999, three days before Ms. McNair started working on the special project. The reorganization resulted in a gain of approximately 20 billets for FMB. One of those resources was (b)(6) & (b)(7)(C) the employee to whom the project was reassigned after Ms. McNair's retirement, in October 1999.

62. When asked about his knowledge of and/or involvement in Ms. McNair's downgrade from SES to GS and the subsequent creation and abolishment of Ms. McNair's GS-15 position, (b)(6) & (b)(7)(C) stated that he was not even aware those events had occurred until being informed by the investigator during the interview.⁸ He explained that Mr. Panek handles civilian personnel matters and that he handles military personnel matters and that he is generally too busy to pay much attention to the civilian side. He knew that (b)(6) & (b)(7)(C) had taken Ms. McNair's SES position in FMB and that, rather than retire immediately, Ms. McNair was doing some special project work for (b)(6) & (b)(7)(C) on a telecommuting basis. He, more or less, assumed that she was still an SES. He saw her occasionally in the building, but did not know anything about her work, except that it "had something to do with the civilian work force, in terms of who we have, whether we train them right or get the experienced ones." He was aware that she had eventually stopped doing the special project work and retired, but he did not know she had received a DSR. [Ref (n)]

63. (b)(6) & (b)(7)(C) acknowledged that creating a job with the idea of abolishing it to facilitate a DSR for which an employee would not otherwise be eligible, is an issue of potential fraud. It is at least inappropriate. He stated that such a scenario orchestrated by Mr. Panek would be "largely inconsistent with what [he has] seen on a daily basis [for 18 months] in terms of [Mr. Panek's] propriety and integrity...." [Ref (n), p. 32 of 19 Jan 00 and p. 10 of 2 Feb 00]

- Perspective of Principle Deputy, ASN (FM&C) -

64. In approximately June 1999, Mr. Panek initiated discussions with (b)(6) & (b)(7)(C) on how to resolve the core competency project, which needed much work after the (b)(6) & (b)(7)(C) effort. Both agreed that it was desirable to put someone full-time on that effort, and (b)(6) & (b)(7)(C) suggested Ms. McNair. In interview, (b)(6) & (b)(7)(C) stated that she was unaware at the time of this discussion that Ms. McNair wanted to leave her SES position. However, (b)(6) & (b)(7)(C) later contradicted herself by stating that her suggestion to use Ms. McNair on the project "came about after they had made the decision to move her." [Ref (l), pp. 23-24]

65. (b)(6) & (b)(7)(C) was unable to recall details of what followed, and her next specific recollection involved her approval of Ms. McNair's telecommuting agreement. (b)(6) & (b)(7)(C) stated that she was not involved in conversations or included in the process regarding Ms. McNair's conversion from SES to GS-15. (b)(6) & (b)(7)(C) believed that the decision to move Ms. McNair to a GS-15 position had already been made when she received and approved the telecommuting agreement. She stated that it would have been "hard to approve" if it had Ms. McNair still been in an SES position. [Ref (l), pp. 14-16 and 31-32]

66. While serving in her current position, (b)(6) & (b)(7)(C) has been unaware of any SES officials, other than Ms. McNair, taking a voluntary downgrade to GS-15. She did not ask Mr. Panek why Ms. McNair was doing that. She was not aware that Ms. McNair was ineligible to retire at the time she took the downgrade, and she was not privy to any discussions concerning Ms. McNair's possible retirement. [Ref (l), pp. 36-37]

67. (b)(6) & (b)(7)(C) did not see the PD for Ms. McNair's GS-15 position. However, she estimated that the project assigned to Ms. McNair, which she (b)(6) & (b)(7)(C) supervised, should have taken from 6 to 9 months to complete. By the time of her retirement, Ms. McNair had only completed the budget analyst piece of the project; the accounting portion was pending. [Ref (l), pp. 42-43]

- Reassigning the Special Project -

⁸ This statement is inconsistent with the fact that (b)(6) & (b)(7)(C) signed the paperwork requesting her conversion to GS-15. It is also unlikely that he did not see the PD, since, as a matter of standard personnel management practice, the associated PDs are attached to the personnel action requests.

68. By 9 October 1999, Ms. McNair “basically had finished the first phase” of the work Mr. Panek gave her. When Ms. McNair retired, he gave her work product to (b)(6) & (b)(7)(C) to use it as a model and expand it to other financial fields. Mr. Panek asked (b)(6) & (b)(7)(C) Policy and Procedures Division (b)(6) & (b)(7)(C), “to continue work on that from the budget...take that product and start defining it relative to course content for training and development.” [Ref (g), pp. 43-45]

69. As a result of the ASN (FM&C) reorganization, (b)(6) & (b)(7)(C) was reassigned on 1 July 1999 from the position of (b)(6) & (b)(7)(C) Financial Management Policy and Systems Division (FMO-1), Office of Financial Operations (FMO), to her current position. (b)(6) & (b)(7)(C), reassignment to Mr. Panek’s organization nearly coincided with the date on which Ms. McNair commenced working as a GS-15 special assistant in a telecommuting capacity. [Ref (q)]

70. (b)(6) & (b)(7)(C) stated that on 28 October 1999, Ms. McNair, although already retired, briefed her work product to the DON Civilian Career Planning Board. The product was incomplete insofar as it lacked input from at least two Navy activities. The report also did not relate the competencies to grade levels. Mr. Panek transferred responsibility for completing the project to (b)(6) & (b)(7)(C) upon the completion of Ms. McNair’s presentation. [Ref (q), pp. 5-6 and 10-11 of 2 Feb 00; p. 15 of 23 Feb 00]

71. (b)(6) & (b)(7)(C) also stated that Mr. Panek directed that she carry out those portions of the project that Ms. McNair had not accomplished. She learned he had tasked Ms. McNair not only to develop core competencies for Navy financial managers, but also to develop the requisite training associated with those competencies. [Ref (q), pp. 6 and 8-9 of 2 Feb 00; p. 16 of 23 Feb 00]

72. (b)(6) & (b)(7)(C) stated that the project could have been accomplished by other persons within the FM&C organization, including herself: [Ref (q), pp. 21-22 of 2 Feb 00]

I worked with (b)(6) & (b)(7)(C) back in the old days. I’ve been working on this kind of stuff for 15 or 20 years. [I]...probably had more knowledge than anybody;...I developed competencies at...HRO Crystal City; I did a [GS-]9/11/12. We did the [GS-]13/ 14’s. So I’ve got files with all these things that I’ve done over the years.

73. (b)(6) & (b)(7)(C) conceded however, that she was not sure whether on 1 July 1999, Mr. Panek was aware of her expertise. However, (b)(6) & (b)(7)(C) was well aware of her background in core competencies, as she had worked for (b)(6) & (b)(7)(C) since the 1980s on related issues. [Ref (q)]

74. (b)(6) & (b)(7)(C) stated that even though she was well qualified to perform the core competency task, she and her organization were deeply involved in budget review matters from early July 1999 to early January 2000. Several other factors contributed to her inability to resume the core competency study immediately after the budget review was completed, including a relocation of her organization to another building. [Ref (q)]

- Navy’s DSR Certification to OPM –

75. On 22 October 1999, (b)(6) & (b)(7)(C), Staffing and Classification Branch, SHHRO, signed OPM’s Form 1510, “Discontinued Service Retirement, Chapter 44, Certification of Agency Offer of Position and Required Documentation (for Discontinued Service Retirement Under CSRS and FERS).” He certified for the Navy that the attached documentation in the case of Ms. McNair met the requirements of Chapter 44 of the CSRS and FERS Handbook for Personnel and Payroll Offices. [Ref (r)]

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Allegation #2: That Mr. Nemfakos, Dr. Nussbaum, and Ms. Welch improperly manipulated the retirement system to allow Dr. Nussbaum to receive a retirement annuity to which he was not entitled, in violation of 5 USCS § 8336; the Joint Ethics Regulation (DOD 5500.7-R); and OPM Guidelines (Settlement of Federal Personnel Actions and the CSRS/FERS Handbook for Personnel and Payroll Offices).

Findings

- Dr. Nussbaum's Initial Interest in DSR Eligibility -

76. Please see enclosure (2) for a brief chronology concerning this allegation.

77. In early 1999, Dr. Nussbaum filed a conflict of interest memorandum with Counsel, ASN (FM&C), concerning his possible negotiations for employment with Booz-Allen & Hamilton. Later, in early Summer 1999, he told (b)(6) & (b)(7)(C), NCCA, that Booz-Allen & Hamilton had agreed to employ him commencing in October 1999. Although Dr. Nussbaum met the age requirement, he did not have sufficient time in federal service to retire. Nonetheless, in approximately August 1999, he told Mr. Nemfakos that within 6-8 weeks he was going to leave federal service, and he asked him whether it was possible to get an "early-out." [Refs (b), pp. 3-4; (s); and (t), pp. 5-6, 29, and 32]

78. According to Dr. Nussbaum, Mr. Nemfakos told him that he would look into the possibility of his getting an early-out. Two or three times between August and November 1999, Dr. Nussbaum asked Mr. Nemfakos about the status of his request. When he told Mr. Nemfakos that he was frustrated, Mr. Nemfakos replied again that he was looking into the matter. [Ref (t), pp. 9-11 and 38-39]

79. Mr. Nemfakos described his professional relationship with Dr. Nussbaum and the exchange they had concerning his plan to leave federal service: [Ref (u)]

a. The relationship was "prickly." Dr. Nussbaum was "very entrepreneurial" and did not adopt Mr. Nemfakos' priorities for the Department. Dr. Nussbaum "needed to be managed a lot" with respect to focusing him on what the Department needed, when it needed it, and how to go about satisfying it. [pp. 40-42]

b. In approximately the Summer of 1999, "but not much before that," Dr. Nussbaum first told Mr. Nemfakos that he intended to leave the Government. At that time Dr. Nussbaum did not give Mr. Nemfakos a planned departure date. In spite of their prickly relationship, Mr. Nemfakos unsuccessfully tried to persuade him not to leave the Government. [pp. 44-46]

c. Dr. Nussbaum was "very persistent" and talked to Mr. Nemfakos "repetitively" about leaving. He expressed his desire to have his SES position abolished, so he could retain his Government health benefits. Mr. Nemfakos did not consider abolishment to be a viable option for the organization. He told Dr. Nussbaum that he would consult the civilian personnel community about options to accommodate him. [pp. 47-48]

- Mr. Nemfakos' DHP/DMOC Study for VCNO and UNSECNAV -

80. On approximately 14 September 1999, Mr. Nemfakos tasked NCCA to develop a modeling and analysis capability for an innovative concept in delivering health care to all eligible beneficiaries of the Defense Health Program (DHP). The concept coupled enhancing beneficiaries' choices of providers with equal or better level of care compared to the status quo. In a parallel tasking, the Vice Chief of Naval Operations (VCNO) tasked NCCA to provide

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support to the Defense Medical Oversight Committee (DMOC) in gaining an understanding of the DHP through a detailed budget scrub and developing the capability described above. Both tasks were subject to very short fuses, with significant work to be completed by the end of October 1999. On 3 November 1999, Dr. Nussbaum recommended on-the-spot cash awards for the 9 NCCA modeling and analysis team members who had already completed taskings. [Refs (v), (w), and (x)]

81. (b)(6) & (b)(7)(C) Economic Analysis Division, NCCA, stated that during the first 2 weeks of September 1999, Dr. Nussbaum assigned him to be the DMOC project manager. The urgency for completion of the project was "extreme," as NCCA was given "three or four weeks to get the whole thing done." As a consequence, (b)(6) & (b)(7)(C) felt he was under more pressure than he had experienced on any project in the previous 6 years. Within 4 weeks, by mid-October, the project was 90 percent complete. [Ref (x)]

82. (b)(6) & (b)(7)(C) was not aware that Mr. Nemfakos had designated Dr. Nussbaum as a Special Assistant for the DMOC project or that there was a GS-15 position created for that purpose. Placing Dr. Nussbaum full-time on the DMOC project did not make any sense, given the fact that NCCA's 6-week effort had already effectively "answered the mail." Dr. Nussbaum continued to function as the NCCA (b)(6) & (b)(7)(C) until his departure from Government service. He "directed" NCCA's DMOC study, but did not have time to be the action officer. [Ref (x)]

- Dr. Nussbaum Confronts Mr. Nemfakos -

83. At 0900 on 5 November 1999, Dr. Nussbaum, (b)(6) & (b)(7)(C), and several other NCCA analysts met with Mr. Nemfakos in his office. The purpose of the meeting was to brief Mr. Nemfakos on the results of the DMOC study, in preparation for briefing the Under Secretary of the Navy (UNSECNAV). According to witnesses, Dr. Nussbaum initially did not sit at the main table and would neither look at Mr. Nemfakos nor respond to him. Mr. Nemfakos, sensing that Dr. Nussbaum was unhappy, excused himself and Dr. Nussbaum temporarily from the meeting. [Refs (b), p. 8; (y); and (z)]

84. Dr. Nussbaum recalled that when they exited the meeting, Mr. Nemfakos asked him what was wrong. Dr. Nussbaum, who conceded he may have spoken "sharply," replied that he "was frustrated" over "no action" on his request for determination on whether "there was any way" that he "could get an early-out." Mr. Nemfakos then "said something soothing" and that he would "take up this issue." Dr. Nussbaum did not recall whether on that occasion he mentioned the date on which his prospective employer expected him to start work or whether he brought up Ms. McNair's recent early retirement. [Ref (z)]

85. Mr. Nemfakos recalled that "in the Fall of 1999," Dr. Nussbaum told him that he had completed negotiations for employment with Booz-Allen & Hamilton and was anxious to leave Government and start work with them. Although Mr. Nemfakos cannot remember whether on any occasion Dr. Nussbaum mentioned Ms. McNair's early retirement, he thinks "it's entirely possible" that he did. He further recalled that Dr. Nussbaum mentioned target dates to him: [Ref (h), pp. 45 and 52]

Target dates came up late in the Fall, because I was trying to do this correctly – you know, I guess I wasn't moving fast enough, is the answer. So at a certain point in time, he came to me and said, "Hey, you know, I negotiated some employment here, and I'm now under some pressure, because – you know, people, you know, would like me to get started."

86. Mr. Nemfakos did not remember excusing himself and Dr. Nussbaum from a meeting on November 5th to talk privately about what was bothering Dr. Nussbaum. However, he acknowledges the following possibility: [Ref (u), p. 27]

[I]t is entirely possible that the coincidence here is that I had it [the PD]; I was working on it. I hadn't completed it, you know, in terms of making adjustments and signing it out, and the conversation that you're recalling in fact led me to go ahead and finish it up and get it done.

87. Mr. Nemfakos stated there were various reasons why it took so long, i.e., from the Summer to November 1999, to help Dr. Nussbaum by creating a position for him. At first, Mr. Nemfakos wasn't sure he wanted to do anything. Then there were the issues of whether it could actually be done and, if so, how to do it. After he made a decision to create a position, the process of preparing an acceptable PD was protracted, as he considered the first version to be "a joke." Lastly, at that particular time, the budget review process absorbed most of his time and attention. [Ref (u), pp. 26-28]

88. Either on Friday, 5 November 1999, or Monday morning, 8 November 1999, Mr. Nemfakos classified a new operations research analyst GS-1515-15 PD ("Special Assistant to the Director") to support the DHP/DMOC project.⁹ In response to the investigator's observation that the project appears to have been virtually completed before the creation of Dr. Nussbaum's special assistant position, Mr. Nemfakos stated: [Refs (u), p. 34; and (aa)]

And very frankly, I am not surprised that it appears that way to you. If one looks at this thing, it is very easy to say, well, what the hell was he going to do now? And I guess the only thing I can tell you is that you have to rely on what I'm telling you, which is that we were in fact interested in raising this thing to another level of energy and knowledge. And to do that, we needed things that weren't extant in NCCA. And the thought was that we were going to use Nussbaum to kind of pull these things together quickly to allow us to actually get to a different decision model.

- DASN's Office Accommodates Dr. Nussbaum -

89. In the Summer of 1999, Mr. Nemfakos asked Ms. Welch what options were available to accommodate Dr. Nussbaum's desire to leave Government and retain his federal health insurance. She told him the solution was either to abolish the SES position or move Dr. Nussbaum into another position and abolish that one.¹⁰ Mr. Nemfakos chose the latter option. [Refs (h), pp. 48-50, and (o), p. 10 of 16 Jan 00]

90. During the first week of November 1999, Ms. Welch called Dr. Nussbaum and told him that he would be contacted by (b)(6) & (b)(7)(C) of her staff, who was going "to work" the action which would make it possible for him to get an early-out. [Ref (t), pp. 12-13]

91. At that time, Ms. Welch told (b)(6) & (b)(7)(C) that the only way to give Dr. Nussbaum an early retirement was to abolish his SES position, but that management was unwilling to give up the SES billet. She, therefore, was presenting (b)(6) & (b)(7)(C) with the challenge of resolving this "dilemma." [Ref (bb), p. 11]

92. (b)(6) & (b)(7)(C) suggested to Dr. Nussbaum the possibility of invoking the mobility provisions of the SES program and offering him an assignment outside the commuting area, which he could then decline, which in turn would then give him eligibility for DSR. Dr. Nussbaum rejected that option. [Ref (bb), pp. 15-16]

⁹ The PD cover sheet shows Mr. Nemfakos' signature as immediate supervisor and classification official. In both places he has affixed a date of "5 Nov '99" which, in the same ink, appear to have been changed to "8 Nov '99."

¹⁰ Ms. Welch's discussion of options is elaborated in the section of the report entitled, "Perspective of DASN for Civilian Personnel and EEO."

93. After discussions with her colleagues, principally (b)(6) & (b)(7)(C) Executive Personnel Leadership Development, (b)(6) & (b)(7)(C) suggested to Dr. Nussbaum that he inform Mr. Nemfakos in writing that he wanted to be downgraded from SES to a GS-15 position “for whatever reason [he] want[ed] to give.” [Refs (t), pp. 14, 17-18, and 43; and (bb), pp. 17-18]

94. (b)(6) & (b)(7)(C) then told him to write a PD for a GS-15 special assistant position. He told her that he had been spending all his time on a health care issue, so they “settled on” describing the special assistant job in the context of what he was already doing to work that issue. (b)(6) & (b)(7)(C) assisted in editing the PD, but confined her assistance to formatting a document that Dr. Nussbaum gave her. [Refs (t), pp. 23-26 and 48; and (bb), pp. 24-25]

95. Dr. Nussbaum thinks that he consulted Mr. Nemfakos on writing the PD and that Mr. Nemfakos suggested calling it “special assistant” and may have also suggested describing the position in terms of the health care study. Dr. Nussbaum stated that he wrote the PD from the technical aspect and that (b)(6) & (b)(7)(C) helped put the rest of it together. Doing a “cut and paste job,” he constructed the PD with the same verbiage that he had used for justifying the on-the-spot awards for the work his subordinates had already done on the DMOC project. The PD described the position as “that of a Special Assistant/ Operations Research Analyst providing special projects support to the Director, Naval Center for Cost Analysis.”¹¹ [Refs (t), pp. 45-47, and (aa)]

96. In an e-mail to Ms. Welch of 5 November 1999, (b)(6) & (b)(7)(C) updated her on the progress of Dr. Nussbaum’s case, stating: [Ref (cc)]

[O]n Monday I’ll call (b)(6) & (b)(7)(C) and ask her to create a SF-52 to effect the voluntary change to the pay system, to which she’ll attach Dan’s [Nussbaum’s] memo. I’ll also speak to (b)(6) & (b)(7)(C) about expediting the action so that we get two pay periods on the new PD (11/7 - 12/4). Then, the action to abolish the GS-15 can be effective as early as 12/5.

97. By memorandum to Mr. Nemfakos of 8 November 1999, Dr. Nussbaum requested a change in paygrade from SES-3 to GS-15, “to accept the position of Special Assistant to the Director, Naval Center for Cost Analysis.” He stated that he understood he would “be tasked with developing a modeling and analysis capability for innovative concepts in health care delivery to eligible beneficiaries of the Defense Health Program.” [Ref (aa)]

98. Mr. Nemfakos stated that he engaged Dr. Nussbaum as a Special Assistant for the purpose of taking the DMOC project “to the next level,” which was implied in the PD’s reference to “flexible use for further exploration, decision space underlying the DHP issue....” Mr. Nemfakos estimated that the work to be performed by Dr. Nussbaum would take 2 months. He further described “the next level” as follows: [Refs (h), pp. 58-59; and (u), pp. 19, 31-32, and 36-37]

The next step, then, was to take those general propositions and try to get more, better information on the specifics in the health care area – get more activity done at the senior levels, in the context of articulating what this new thing would look like; and partnering, potentially, with some people on the outside that had better databases, to try to come up with conclusions.

99. Mr. Nemfakos stated that he “spent time with [the PD], because [he] didn’t want it to be a hokey position description; [he] wanted it to really articulate what it was that he [Dr. Nussbaum] was doing.” He “probably” had several conversations with Ms. Welch concerning the PD. Yet,

¹¹ This is a distinction from working directly for Mr. Nemfakos and makes it appear that Dr. Nussbaum would be reporting to himself.

he could not explain why the language in the PD was nearly identical to the words used for the on-the-spot awards that were generated on 3 November 1999 in recognition of NCCA's completed efforts on the DMOC project. He also could not explain why Dr. Nussbaum's request for a downgrade stated that he "will be tasked" to do those things which had already been completed.¹² [Refs (h), p. 51; and (u), pp. 10, 29-30, and 37-38]

- Concerns About the Propriety of the Plan -

100. Several officials interviewed pursuant to this inquiry expressed reservations about the propriety of the plan to create a position for Dr. Nussbaum and abolish it for the express purpose of making him eligible for a DSR.

101. (b)(6) & (b)(7)(C) who prepared the personnel action requests for ASN (FM&C), stated that she "disagreed" with converting Dr. Nussbaum to a GS-15 and then abolishing his position so he could retire, although she did not share that opinion with her supervisors. She commented, "I mean. You know, a lot of people would like to do that and don't have the option."^{(b)(6) & (b)(7)(C)} was not alone in her misgivings. She stated: [Ref (dd), pp. 18-19]

We talked with (b)(6) & (b)(7)(C) Secretariat Headquarters Human Resources Office (SHHRO)]," and asked him, "... could we do this?" He says, "It's short notice and it looks kind of fishy, but you know, they say management does it all the time."

102. (b)(6) & (b)(7)(C) described his concern as follows: [Ref (ee)]

a. He first became aware of the GS-15 position for Dr. Nussbaum when he saw the personnel action request that was delivered to his office in early November 1999. Because an SES conversion to GS-15 is an unusual event, he put a temporary hold on the action and asked his deputy, (b)(6) & (b)(7)(C) to determine the reason for the conversion request. On 15 November 1999, in response to (b)(6) & (b)(7)(C) inquiry, (b)(6) & (b)(7)(C) received two calls from the office of the DASN for Civilian Personnel and EEO, one from (b)(6) & (b)(7)(C), and the other from (b)(6) & (b)(7)(C) Executive Personnel Leadership Development. [pp. 3-8 and 18]

b. (b)(6) & (b)(7)(C) told him that she did not see "anything regulatorily wrong" with Dr. Nussbaum going to a GS-15 position and subsequently retiring from that job, if it was abolished. While he agreed with (b)(6) & (b)(7)(C), he had reservations, particularly since it sounded as if the job was going to be abolished soon after it was created. Furthermore, he understood that the intent was to facilitate a DSR for Dr. Nussbaum. [p. 22]

I was uncomfortable with it, but (b)(6) & (b)(7)(C) is an expert in researching the regs and the staffing end of it. And then (b)(6) & (b)(7)(C), who is the director of executive personnel, called back and said, "Yeah, this is okay to do."...They're the experts on interpretation of policy and regulations. So they're just the people in Navy that maybe would be involved to give us a green light to go ahead and send something out to the service center.

c. Neither (b)(6) & (b)(7)(C) nor (b)(6) & (b)(7)(C) could find a "piece of paper that says you can't" set up a job just for the purpose of facilitating the retirement of someone earlier than when he or she would otherwise be eligible. On that basis, he understood them to be giving him "a green

¹² (b)(6) & (b)(7)(C) was aware that the PD for the Special Assistant job contained the verbiage used as the basis of the on-the-spot awards given to NCCA employees for their work on the DMOC project. He underscored the fact that the work was essentially done by 10 November 1999 when Mr. Nemfakos, Dr. Nussbaum, and NCCA analysts briefed the UNSECNAV. After the briefing, they made only small changes to the work product, principally in cleaning up some of the slides.

light to go ahead and send [the personnel action request] to the [human resources] service center for them to take the action.” [pp. 20-21 and 31]

d. He told his boss, (b)(6) & (b)(7)(C), Acting Assistant for Administration in the Office of the UNSECNAV, that he had received the proposed actions and also that it was his understanding that after Dr. Nussbaum’s reassignment to the GS-15 position, it would be abolished so that he could leave the Government on a DSR. (b)(6) & (b)(7)(C) also told him that neither (b)(6) & (b)(7)(C) nor (b)(6) & (b)(7)(C) could find any regulation that would prohibit such action, and furthermore, that (b)(6) & (b)(7)(C) said such action had been effected at other agencies where he previously worked. (b)(6) & (b)(7)(C) felt uncomfortable with the action too, but after learning that (b)(6) & (b)(7)(C) had discussed the matter with (b)(6) & (b)(7)(C) and (b)(6) & (b)(7)(C), told (b)(6) & (b)(7)(C) to send the action to the HRSC for processing. On 16 November 1999, (b)(6) & (b)(7)(C) hand-carried the personnel action request to the Human Resources Operations Center at Nebraska Avenue. [pp. 23-24, 38, 47, and 53]

103. (b)(6) & (b)(7)(C) who assumed his current position in June 1999, stated that in early November 1999 (“probably” the 5th), (b)(6) & (b)(7)(C) discussed with him whether Dr. Nussbaum could receive retained pay when he converted from SES to GS-15. (b)(6) & (b)(7)(C) then researched the issue and provided feedback to both (b)(6) & (b)(7)(C) and Ms. Welch either later that day or on Monday, November 8th. (b)(6) & (b)(7)(C) further stated: [Ref (ff)]

a. (b)(6) & (b)(7)(C) told him that Dr. Nussbaum wanted to retire from the GS-15 position. He understood that the plan was to abolish the GS-15 position to facilitate Dr. Nussbaum’s retirement and eligibility for benefits to which he would not otherwise be entitled. However, he did not discuss that particular issue with her, nor did he get into discussion with anyone else about how to accommodate an employee “getting to full retirement without penalty.” His discussions focused on what would be appropriate for abolishing a position, retaining pay, and preserving a resource or back-filling a position once an employee leaves. He is not aware of any instance in Government when an SES was converted to a GS-15 and then had his or her position abolished to facilitate early retirement. [pp. 29, 31-33, and 35]

b. Sometime during the first few days of November 1999, (b)(6) & (b)(7)(C) called him and expressed concerns about the fact that, once Dr. Nussbaum took his GS-15 position, it was going to be abolished. (b)(6) & (b)(7)(C) wanted to know whether in fact that was management’s plan. (b)(6) & (b)(7)(C) told (b)(6) & (b)(7)(C) he did not know what management planned to do after Dr. Nussbaum was converted to a GS-15. He advised (b)(6) & (b)(7)(C) to raise his concerns with the managers, but also said, “In the interim we need to process the action.” Although (b)(6) & (b)(7)(C) knew that creating and abolishing a job to facilitate DSR was inappropriate, he did not share that opinion with (b)(6) & (b)(7)(C) he had the impression that (b)(6) & (b)(7)(C) already knew it was inappropriate. He told (b)(6) & (b)(7)(C) that whenever management is reshaping its workforce, it will abolish jobs where there is no longer a need, and the employee may take a DSR. [pp. 15, 26, 33-34, and 36-38]

104. (b)(6) & (b)(7)(C) stated that (b)(6) & (b)(7)(C) asked her why there was a proposal to downgrade Dr. Nussbaum. When she explained Dr. Nussbaum’s motivations, (b)(6) & (b)(7)(C) said that the proposed action made him “nervous,” and he asked (b)(6) & (b)(7)(C) to discuss the matter with her chain of command. [Ref (bb), pp. 45-46]

105. (b)(6) & (b)(7)(C) spoke with (b)(6) & (b)(7)(C) and conveyed (b)(6) & (b)(7)(C) concern. She quoted herself as saying: [Ref (bb), pp. 51-52]

“[A]re you aware of the case of Dr. Nussbaum?” (b)(6) & (b)(7)(C) is having some problems with it, you know.” “...What’s going to be the problem?” (b)(6) & (b)(7)(C) replied that (b)(6) & (b)(7)(C) had talked to him about it and he (b)(6) & (b)(7)(C) was also concerned that it “looked funny.” Because he said, “I’m assuming that the next step is I’m going to get a [SF]52 to

abolish his job.” And I said, “...Yes, the next step is you’re going to get a 52.” And he said, “Well, it looks like we’re doing something for him that we wouldn’t do for anybody else.”

106. (b)(6) & (b)(7)(C) informed (b)(6) & (b)(7)(C) that creating and abolishing a job to facilitate the departure of an employee had happened “lots of times.” Although (b)(6) & (b)(7)(C) continued to express misgivings, (b)(6) & (b)(7)(C) told him that she would proceed with assisting Dr. Nussbaum, stating, “You do what you think is right, but I’ll continue to do what I think is right.” Shortly after (b)(6) & (b)(7)(C) exchange with (b)(6) & (b)(7)(C) Dr. Nussbaum contacted her to inquire about the status of his case. She told him that there had been some concern raised by the personnel office over the circumstances of his proposed departure. [Ref (bb), pp. 52 and 55-56]

107. Sometime between Veteran’s Day and Thanksgiving 1999 (11-25 November), (b)(6) & (b)(7)(C) informed (b)(6) & (b)(7)(C) that, his misgivings notwithstanding, SHHRO had submitted the personnel actions regarding Dr. Nussbaum to the HRSC for processing. (b)(6) & (b)(7)(C) made the following comments concerning (b)(6) & (b)(7)(C) apparent change of heart: [Ref (bb), pp. 54 and 78]

[I]nitially he had a reaction...“if it quacks like a duck, looks like a duck,” you know, one of those things. I hope he didn’t change his mind because of anything I said to him that he felt was bringing pressure to him; I didn’t intend to do that. I just said to him, “From my perspective, (b)(6) & (b)(7)(C) I don’t see what other choice we have, you know; the man is not going to resign; we’re not going to abolish his job; if we want to have a win/win situation here, where the Navy wins and Dr. Nussbaum wins, then the only thing we can do is let him change to a lower grade and let him go.”

108. (b)(6) & (b)(7)(C) recalled that, initially, both she and (b)(6) & (b)(7)(C) were under the impression that Dr. Nussbaum’s GS-15 Special Assistant position would last 6 to 9 months and then be abolished. She based her estimate on the proposed PD, which called for Dr. Nussbaum to conduct a study, which would take “months” to complete. It was only after she asked (b)(6) & (b)(7)(C) for copies of Dr. Nussbaum’s retirement paperwork that she realized how quickly he actually planned to leave, which gave her pause:¹³ [Ref (bb), pp. 16, 70, and 83]

I looked at it and I said, “Oh my goodness; the 6-9 months I thought was going to happen is 6-9 days!”

...if it had transpired the way that I thought it was going to transpire, it would have been okay...I didn’t say it was “right;” I just said it was “okay”...I think it was going a little bit beyond the narrow scope of what the personnel department does in order to reach a goal...[that is] mutually beneficial to the employee and the Department...it was certainly not within the normal range of activities or actions that the personnel function would take...So

...it was “above and beyond.”...None of this should have come through my office...and I will probably never help anybody again.

109. (b)(6) & (b)(7)(C) stated that in early August 1999, Dr. Nussbaum told him in confidence that he wanted to leave the Government and go to work for Booz-Allen & Hamilton. He wanted to know how he could retire early. (b)(6) & (b)(7)(C) told Dr. Nussbaum that the only way was to abolish his position, and he recommended that he talk to Mr. Nemfakos. After several weeks, Dr. Nussbaum began visiting (b)(6) & (b)(7)(C) periodically to ask him whether Mr. Nemfakos had spoken to him about this matter. (b)(6) & (b)(7)(C) told him that Mr. Nemfakos had not talked to him. Dr. Nussbaum declined (b)(6) & (b)(7)(C) offer to address the matter with Mr. Nemfakos, because he did not want Mr. Nemfakos to know that he had brought the issue to (b)(6) & (b)(7)(C). (b)(6) & (b)(7)(C) was “happy” with keeping the confidence, because that got him “less involved.” [Ref (gg), pp. 8-11]

¹³ Likewise, (b)(6) & (b)(7)(C) supervisor, Ms. Welch, believed the duration of the job was significant. (See section of this report entitled, “Perspective of DASN for Civilian Personnel and EEO.”)

110. Also in August 1999, Ms. Welch asked (b)(6) & (b)(7)(C) whether Dr. Nussbaum had talked to him about his desire to retire early. He told her that Dr. Nussbaum did consult him and that he told him that he did not see any way other than abolishing the position and perhaps converting the O-6 Deputy position into an O-6 Director position. [Ref (gg), pp. 8 and 16-17]

111. In interview, (b)(6) & (b)(7)(C) stated: [Ref (gg), p. 16]

What isn't legitimate is, in my opinion, to create a position that you're going to abolish; in other words: create a position for the sake of abolishing it.

112. In a conversation with (b)(6) & (b)(7)(C) told him that "there was no other legitimate way" to give Dr. Nussbaum an early-out, other than abolishing his SES position while he was still in it. (b)(6) & (b)(7)(C) left (b)(6) & (b)(7)(C) with the impression that creating positions for the sake of abolishing them was a practice within OSD. [Ref (gg), pp. 18-19]

113. When the paperwork creating/abolishing the GS-15 position was submitted to SHRO, (b)(6) & (b)(7)(C) and (b)(6) & (b)(7)(C) discussed whether the personnel action should be stopped. (b)(6) & (b)(7)(C) recalled: [Ref (gg), pp. 20 and 22]

At the very, very, end he (b)(6) & (b)(7)(C) told me that the [SF]52 had come through the office but – and we talked about, you know, should we, you know, stop this or whatever. And — and we didn't. You know, maybe I should have said, "Yeah, we should stop this."... So I guess maybe we should have interceded...I should have gone over there [across the hall to Mr. Nemfakos' office] and said, "Look, I don't think this is the right thing to do." I'm pretty convinced he [Mr. Nemfakos] probably wouldn't have done that [i.e., let the action go through]...So I feel bad about that...I have a lot of other things to occupy me; I mean it wasn't real high on my priority list at all.

114. (b)(6) & (b)(7)(C), Dr. Nussbaum's (b)(6) & (b)(7)(C) at NCCA, stated that Dr. Nussbaum first approached Mr. Nemfakos in the July/August 1999 timeframe, notifying him of his intention to leave on 8 October 1999, and asking him to find "some creative way" to preserve his health benefits after his departure from Government. [Ref (b), p. 6]

115. Sometime between 9 October and 8 November 1999, Dr. Nussbaum mentioned to (b)(6) & (b)(7)(C) that Mr. Nemfakos had done "this kind of favor" for other people. (b)(6) & (b)(7)(C) stated that Dr. Nussbaum cited Ms. McNair as an example, saying Mr. Nemfakos "enabled her to retire at a very young age and retire with benefits...." [Ref (b), pp. 6-7]

116. According to (b)(6) & (b)(7)(C) Dr. Nussbaum told him that he had to be out of the Government by 13 December 1999, which is when Booz-Allen & Hamilton expected him to start work for them, or else their offer of employment would be rescinded. Dr. Nussbaum said that the Special Assistant position would be graded as a GS-15 and that Mr. Nemfakos was going to disestablish it so that he would be eligible for immediate retirement benefits. Dr. Nussbaum also told him that when Mr. Nemfakos tried to get the personnel action processed, the HRSC "balked" and Mr. Nemfakos "overrode" them, telling them, "It's management's decision; just do it." (b)(6) & (b)(7)(C) concern about the impropriety of this plan fell on deaf ears: [Ref (b), pp. 16 and 26]

a. He told Dr. Nussbaum that the creation and abolishment of the GS-15 position to give him retirement benefits was unethical. Dr. Nussbaum's response was, "It's none of your business and this is how the big kids play." [p. 23]

b. On 29 November 1999, he went to see (b)(6) & (b)(7)(C), ASN (FM&C), and explained to her all that he knew about the creation of the GS-15 position and the plan to abolish it. He recalled her reaction, as follows: [pp. 32-34]

She told me she did not know that that was happening. And she said that if it was correct, it did not sound illegal. It could be done completely legally, but it would be unseemly and it would be favoritism, and suggested that I go direct[ly] to the Under Secretary of the Navy with it.

I told her I did not know the Under Secretary of the Navy and I did not know his ethics, and I did not know how much, you know, he approved or disapproved of this sort of thing, and I didn't think I'd be doing that....

My request to her was that she go to Mr. Nemfakos and tell him that this is wrong and just say "no." I didn't feel it was appropriate for me to go in there to Mr. Nemfakos and say, "I don't like what you are doing," because it would disclose that I knew everything that was going on. I would have preferred that his lawyer go in there and say that this is the wrong thing to do; it's unethical.

She runs her ethics program over there also...I thought that it would be a more powerful statement if his own lawyer walked in there and said, "You can't do this; this is wrong." And she told me she wouldn't do that...that it was not her place to tell him that.

117. (b)(6) & (b)(7)(C) acknowledged that (b)(6) & (b)(7)(C) visited her near the beginning of December 1999. He told her that Dr. Nussbaum was about to retire under a DSR, for which he would not otherwise be eligible, as a result management's creation of a job for him with the sole purpose of abolishing it. She did not find anything illegal with that scenario and did, in fact, recommend that (b)(6) & (b)(7)(C) convey his concern to UNSECNAV. She does not practice personnel law and, therefore, concedes that she is not an expert on this matter. (b)(6) & (b)(7)(C) did not discuss Dr. Nussbaum's situation with anyone, as (b)(6) & (b)(7)(C) asked her to keep their conversation confidential. [Ref (hh), pp. 11, 17, and 36]

- Abolishing the Position -

118. Sometime between Veterans' Day and Thanksgiving 1999 (11-25 November), Dr. Nussbaum asked (b)(6) & (b)(7)(C) about the process for abolishing his prospective GS-15 job. She told him that Mr. Nemfakos should submit a Form SF-52 to the personnel office requesting the action. [Ref (bb), pp. 55-56]

119. According to (b)(6) & (b)(7)(C), Ms. Welch never discussed the abolishment of Dr. Nussbaum's prospective GS-15 position with her. (b)(6) & (b)(7)(C) explained that Ms. Welch was "not a staffing specialist" and that her personnel expertise lay elsewhere. Ms. Welch's concern was focused on not abolishing the SES position, and she did not become aware that the option of abolishing the GS-15 was even being considered until (b)(6) & (b)(7)(C) and (b)(6) & (b)(7)(C) told her that paperwork had been initiated. [Ref (bb), pp. 30-31]

120. Although HRSC Nebraska Avenue had not completed processing the personnel action to establish Dr. Nussbaum's GS-15 position, Mr. Nemfakos, by memorandum to SHHRO of 23 November 1999, initiated action to abolish it.¹⁴ The memorandum stated, in part, that "the functions being performed by the Special Assistant are no longer required and will be absorbed within the Defense Medical Oversight Committee (DMOC)." Mr. Nemfakos also signed the Request for Personnel Action (Form SF-52), which requested abolishing the position with a proposed effective date of 11 December 1999 (2 days before Dr. Nussbaum planned to start work at Booz-Allen & Hamilton). [Ref (ii)]

¹⁴ In turn, on 23 November 1999, (b)(6) & (b)(7)(C) sent Dr. Nussbaum a letter certifying his eligibility for DSR based on position abolishment, notifying him that the position would be abolished no later than 31 January 2000, in accordance with FPM 830-1. He also assured Dr. Nussbaum that he was under no obligation or pressure to apply for a DSR and that the letter was "not a reduction-in-force notice," but rather "advance information provided to [him] for personal planning purposes." [Ref (ii)]

121. Mr. Nemfakos conceded that what Dr. Nussbaum did on the job as his special assistant was “obviously not much.” Mr. Nemfakos explained why he initiated action to abolish the job only two weeks after its creation, in spite of his original expectation that it required someone dedicated to the effort for 2 months on a full-time basis: [Ref (u), pp. 33 and 46-48]

We were trying to incorporate this thing in the budget review process. There was continuing movement on a broad range of fronts, okay? What I guess you’re seeing expressed there is that we were starting to run out of air speed and altitude in terms of being able to really get a lot of work done to make the major policy decisions, and so the prospect was that to the extent we continued the effort, it would have to be continued in a different manner. That it was, in other words, not going to be in our hands to come up with a fresh-up proposal. The prospect in October, okay, was that we were going to have an opportunity to come up with a whole fresh-up proposal, okay? By late November it became clear that, given the politics, we weren’t going to go there. And so the absorption issue is a reflect[ion] of what was going to have to happen.

...I mean, we didn’t make the policy decision that we thought we were going to try to make. We ran out of time. And it became too hard. It became too hard to incorporate any major change... We were starting to arrive at a recognition that we weren’t going to go to that larger idea of trying to dramatically change the health care system...the DMOC now, because this is a defense-wide thing, would have to take whatever the next steps were, given the decisions made on what was to be included in the defense budget.

122. Mr. Nemfakos stated that he did not create the GS-15 job solely, expressly, explicitly to accommodate Dr. Nussbaum and that it would have been wrong to have done so. Yet, he acknowledged that the position was designed to be a temporary job and that he abolished it to accommodate Dr. Nussbaum. Mr. Nemfakos elaborated: [Ref (u), pp. 38-39]

I think we were abolishing the job both because there was a time when either the additional work would be done, or very frankly, it wouldn’t make any difference, and to accommodate Dr. Nussbaum. I’m not going to lie to you and say that what we’re doing is not what we’re doing. What we were doing was in fact pursuing an avenue that would allow Nussbaum to leave Government service...This was an accommodation to allow him to leave. The advice that I got was that it was an appropriate methodology to arrive at that accommodation, and I did it.

123. Mr. Nemfakos stated that he met with Dr. Nussbaum “more than weekly, both one-on-one and in groups” and that Dr. Nussbaum often “needed a little nudge in the way of direction,” i.e., “needed to be managed a lot.” Yet, Mr. Nemfakos asserted that he was not aware that Dr. Nussbaum continued to carry out his duties as Director, NCCA, until his departure from federal service, and that Dr. Nussbaum was “wrong” to have done so. [Refs (h), pp. 42-43; (u), p. 35]

- Dr. Nussbaum’s Overall Perspective -

124. At the time (b)(6) & (b)(7)(C) first contacted Dr. Nussbaum, he believed that the job was going to be created and then abolished for purposes of making him eligible for an early-out. In interview, Dr. Nussbaum stated that Mr. Nemfakos “may have” previously spoken to him about the concept of taking a voluntary downgrade. In addition, he stated: [Ref (t), pp. 44-45]

I think I knew that they were going to move me to a 15 and abolish the 15.. my assumption is that he [Mr. Nemfakos] knew what procedures were being followed...because I presumed that I was talking to (b)(6) & (b)(7)(C) because Ms. Welch had asked her to do this and because Ms. Welch and Mr. Nemfakos had been in contact about how to handle my request, whether it was possible to get an early-out. I presume that knowledgeable people were doing this and they knew what they were doing and it was all proper and this was good for the Department of the Navy, as well as being good for me.

125. Mr. Nemfakos announced in a staff meeting that Dr. Nussbaum would be taking on duties as a special assistant on DMOC. He did not announce that Dr. Nussbaum would be downgraded

to a GS-15. He also did not announce that Dr. Nussbaum's SES position would be vacated. [Ref (t), pp. 41-42]

126. "Nothing strikes [Dr. Nussbaum] as particularly different" about the work he was doing on the DMOC project in October 1999 and the work he did on it following his assignment in November 1999 as special assistant to Mr. Nemfakos. The NCCA was "still building the model and making it useful, cleaning it up, making it better." Dr. Nussbaum "presumes" that Mr. Nemfakos was aware that he continued to perform his duties as (b)(6) & (b)(7)(C), NCAA after the announcement that he was the Special Assistant for DMOC. [Ref (z)]

- Perspective of the Principal Deputy, ASN (FM&C)-

127. In early November 1999, Dr. Nussbaum told (b)(6) & (b)(7)(C) that he wanted to leave the Government and planned on taking a position with Booz-Allen. She had no prior knowledge of his intentions in this regard. She knew that he was not eligible to retire, but she never knew that he actually wanted an early retirement. [Ref (l), pp. 51-55]

128. (b)(6) & (b)(7)(C) asked Mr. Nemfakos whether Dr. Nussbaum had told him that he was thinking about taking another job, and Mr. Nemfakos said that he had. Dr. Nussbaum told her that he was concerned about losing his Government health insurance, but at the time she was unaware of any way for him to avoid that. She was not aware of the concept of his taking a downgrade to a GS-15 to facilitate early retirement. Nonetheless, some time after he communicated to her that he had put Booz-Allen on hold several times, and it was finally time to go, she discovered that he might be taking a downgrade. [Ref (l), pp. 56-57]

I'm trying to remember if there was any real discussion about moving to the 15 level. I can say there was not a lot with me.¹⁵

129. (b)(6) & (b)(7)(C) did not attend meetings on DMOC and therefore was not aware of the status of NCCA's work on the project. She is, however, aware that there is some ongoing follow-on effort. [Ref (l), pp. 63-64]

Charlie [Nemfakos] has asked (b)(6) & (b)(7)(C) to look at it and the Under [Secretary] had wanted to bring somebody in, an actuarial to take a look at the analysis that they had done and to provide them different information. Maybe they had not considered what was actually going on out there in the private sector.

130. She was not involved in any way with the classification of the GS-15 position for Dr. Nussbaum. Since she has been Mr. Nemfakos' Principal Deputy, she has been unaware of any positions that he might have classified. [Ref (l), pp. 68-69]

- Perspective of the DASN for Civilian Personnel and EEO -

131. Ms. Welch recalled that over the course of several months, commencing in approximately January 1999, Dr. Nussbaum expressed an interest in early retirement. In late Summer or early Fall of 1999, he told her that he was particularly interested in an "early-out," as he had an employment offer outside the Government. On each occasion, she referred him to (b)(6) & (b)(7)(C) and Mr. Nemfakos, as she had no early-retirement decision authority. She did not discuss with

¹⁵ Ms. Welch recalled discussion with (b)(6) & (b)(7)(C) asked me about it and then I went to discuss it with her because she called me over there to discuss it with her...I remember talking to (b)(6) & (b)(7)(C) about it, but I don't remember a whole lot about the discussion because, you know, it's a management decision: "If you guys want to do this, these are the steps you have to take;" it was just another one of those personnel things and I don't remember." [Ref (o), pp. 22-23]]

him the possible legitimate ways to obtain an early-out. She recalled: [Ref (o), pp. 4-8 of 16 Jan 00]

I think he looked upon me as the personnel guru, and if anybody could make this happen, I could. But the matter of fact is that I can't. I only know the rules and about "you have to do this to make it legal."

132. Ms. Welch stated that Mr. Nemfakos did not become directly involved with Dr. Nussbaum's situation until October or November 1999. [Ref (o), pp. 9-11 of 16 Jan 00]

[C]harlie [Nemfakos] finally came in here one day and said, "Dan Nussbaum would like an early-out." He asked me what the rules were and I told him, "The rules are: (1), you have to have approval from the major claimant which I think the Secretariat does that; (2) the ways of doing it are you just abolish his job and he can go."

But what is done frequently is that you create a second position and put that person in the second position and wait a period of time and abolish that job....

133. When questioned about the frequency of creating and abolishing jobs to facilitate a departure from federal service, Ms. Welch stated: [Ref (o), p. 11 of 16 Jan 00]

I know they do it in OSD all the time. It's not illegal to do that. It's not something that I would say we do in the Navy very often, but it's not infrequently done within the Government at all...when managers are looking for flexibility, especially at that level, that's something that they have in their tool kit that they can use.

134. In spite of Ms. Welch's assertion that the practice of creating and abolishing jobs to facilitate early retirements was a legal and routine practice within Government, she was unable to identify any instance when such a retirement took place. She was also unable to identify any other sources who could. Ms. Welch also stated that she did not inform Mr. Nemfakos that the above described personnel process was done all the time. She told him only that it was feasible. [Ref (o), pp. 10-15 of 16 Jan 00; p. 19 of 24 Feb 00]

135. Ms. Welch recalled that she first "discerned" that Mr. Nemfakos was going to create a GS-15 position for Dr. Nussbaum when Mr. Nemfakos asked her for help with writing the PD. Ms. Welch stated that her office does not routinely get involved with administrative processes involving individuals, "especially GS-15s;" however, the office which normally handles this process, SHHRO, "didn't seem to be moving fast enough for Charlie [Nemfakos]." Accordingly, Ms. Welch directed (b)(6) & (b)(7)(C) to assist Mr. Nemfakos' office with a new PD and cautioned her to make sure the process was "legal." Ms. Welch stated: [Ref (o), pp. 16-17 of 16 Jan 00]

[W]hen Charlie [Nemfakos] jumps in the middle of something, a splash goes out. So when he jumps, you say, "Okay, whatever you need, Charlie." For me, as long as it's legal, we'll help you. Again, if (b)(6) & (b)(7)(C) was there to answer their questions, fine.

136. Ms. Welch stated that Dr. Nussbaum did not indicate when he wanted to leave his Government employment until: [Ref (o), p. 18 of 16 Jan 00]

[C]lose to the end. He was starting to get frantic because he evidently had had an offer and I wasn't aware of when he got the offer.. he put the people off a couple of times and now he wanted to stick to whatever his timeline was.

Then he just came and said that Charlie [Nemfakos] hadn't done what he was supposed to do and.. he put these people off and Charlie needed to move it faster...That was getting close to the end of...I

think in the middle of November and he wanted to leave in December [1999] or whatever it was he wanted.

137. Ms. Welch discussed Dr. Nussbaum's prospective retirement with (b)(6) & (b)(7)(C). (b)(6) & (b)(7)(C) She could only recall that her discussion with (b)(6) & (b)(7)(C) related to the effect of abolishing Dr. Nussbaum's SES position; she did not remember whether (b)(6) & (b)(7)(C) became involved in the retirement process. Although she recalled (b)(6) & (b)(7)(C) discussing the matter with her, she did not recall the substance of their discussion. She characterized her communication with (b)(6) & (b)(7)(C) as simply giving him a "heads-up," because Dr. Nussbaum fell under his administrative purview. However, as shown below, substantial discussion took place between them, as reflected in their e-mail. [Ref (o), pp. 21-33 of 16 Jan 00]

138. Although Ms. Welch was attempting to keep Dr. Nussbaum's request contained within his own chain of command, she conceded that her assignment of (b)(6) & (b)(7)(C) to assist Mr. Nemfakos was a concession to his status within the Navy. Ms. Welch explained: [Ref (o), p. 26 of 16 Jan 00]

Because it's Charlie Nemfakos who controls the Navy probably more than anybody else. One of the most influential people here who controls the money...Mr. Nemfakos has done many things for me and, you know if this...is important to him, I will help their personnel do whatever needs to be done, if it is legal....

139. Ms. Welch also stated that she confined her advice about personnel matters to the legality of a particular action, notwithstanding its wisdom from a management or ethical point of view: [Ref (o), p. 26 of 16 Jan 00]

[T]here's a difference to me in people's perceptions. It's not a bad personnel practice if it's legal...And that's how I view it. If management can legally take an action -- that we do many things that people don't like, but as long as they're legal, I think that's where we have to go. You know, if this was a legal action. You know, that's how I feel about it.

140. When specifically asked whether it were ethical to create a Government job with the idea of abolishing it to facilitate a discontinued service requirement Ms. Welch replied, "I don't think ethics -- it's not my job to determine the ethics." When Ms. Welch was pressed further about the specifics of Dr. Nussbaum's case, the following exchange occurred: [Ref (o), pp. 29-33 of 16 Jan 00]

Q. But do you think it's ethical [i.e., creating a job with the idea of abolishing it to facilitate a DSR]?

A. Yes, I do.

Q. To create a job expressly for the purpose of abolishing it to facilitate DSR?

A. I've been in this business 29 years and I've seen people do it before.

Q. But I mean the fact that people have done it doesn't necessarily mean it's right.

A. [I]f there [are] ways we can support managers, my job is to find ways to say, "Yes." If we take the law and tie it into a knot or a pretzel and don't break it. My job is to make sure the Department of the Navy does not break laws; that's what I do...My only issue with this was [that] I would have left him [Dr. Nussbaum] in the job longer...when they set it up, when they were going to do it....

Q. [I]'m not sure that how long an employee is in the job has anything to do with whether it's ethical and was created just for the sake of abolishing it.

A. Yeah, it's your opinion of what's ethical and what's not. My job is what's legal and what's not.

- Q. Because what you're looking at is giving an employee...an early retirement, therefore...giving him a benefit that [he] would not otherwise be eligible...to receive.
- A. Right.
- Q. You...just create a job and then abolish it. [It] doesn't strike you that that's wrong?
- A. It's legal and that's what we're here for. It doesn't strike me as anything...If management can do it, my job is to -- the Navy is always looking for flexibility and that's -- you know, this is why you can't back me in the corner. Because ethical or not, as long as they're not illegal, I think is where I stand.
- Q. Well, abolishing [a] job is one thing, but creating a job just to abolish it --
- A. Is done in the Federal Government.
- Q. And you don't see anything wrong with that?
- A. No, I don't.

141. Ms. Welch opined that "if you're going to do this," (i.e., create a job to facilitate an employee's DSR), you create the job to work a specific project with an established termination date: [Ref (o), p. 37 of 16 Jan 00]

So that you can say, "This is a classifiable GS-15 job; there's a beginning and an end and at the end the job goes away;" that's the plain way of doing it.

142. In e-mail to Ms. Welch of 25 August 1999, Dr. Nussbaum disclosed that he had just begun to discuss his plans to leave the Government with Mr. Nemfakos and (b)(6) & (b)(7)(C). He was asking Ms. Welch what he could do "to help the Navy say 'yes' to [his] request for an early retirement." He further stated: [Ref (cc)]

We have talked before about the opportunities for an early retirement. While these conversations were mainly theoretical, I now have a concrete offer of a position in hand, so I want to move the conversation to the more practical.

143. In e-mail to Dr. Nussbaum of 26 August 1999, Ms. Welch stated: [Ref (cc)]

[I]t's probably time you dropped in to see (b)(6) & (b)(7)(C), acting in the AAUSN...John would eventually be the one who would have to approve the VERA [Voluntary Early Retirement Authority]. Even if Charlie [Nemfakos] and (b)(6) & (b)(7)(C) agree, John still has to approve it too. As you probably know, he is a good guy and would give you a straight answer on how he felt.

144. In e-mail to (b)(6) & (b)(7)(C) of 17 September 1999, Ms. Welch stated: [Ref (cc)]

[D]an Nussbaum is looking for help. He said that Charlie [Nemfakos] had sent him back to me. He would like to leave next month. This really is a Secretariat issue. Is there anything we can do to help get a decision one way or another? I'll be gone but he drops in or sends an e-mail regularly. (b)(6) & (b)(7)(C) is available if we can do anything...Could you contact him [Dr. Nussbaum] please?

145. In e-mail to Ms. Welch of 20 September 1999, (b)(6) & (b)(7)(C) stated: [Ref (cc)]

He's [Dr. Nussbaum's] been here several times and I've told him that he has a very narrow set of opportunities to get what he wants. Without abolishing his position, I don't think there is any legitimate way to do this without putting the Secretariat in jeopardy....

146. In e-mail to (b)(6) & (b)(7)(C) of 12 October 1999, Ms. Welch stated: [Ref (cc)]

[C]an't you reassign him [Dr. Nussbaum] to one of the [GS-]15 [position]s and abolish it? He indicated that abolishing one of them would not be a problem as they probably had too many anyway....

147. When the investigator implied that her e-mail indicated she had suggested a particular course of action, she replied: [Ref (o), p. 33 of 16 Jan 00]

I guess you can read it that way; I look at it as laying out their options...again, my premise is: "Is it legal or illegal?" If (b)(6) & (b)(7)(C) doesn't feel that this is something that he wants to do, that's his opinion as an ex-personnelist.

148. In e-mail to Ms. Welch of 13 October 1999, (b)(6) & (b)(7)(C) replied to her proposal by stating: [Ref (cc)]

That is an option but a little risky in that it would be hard to say you did it for any reason but to allow him to retire. A much cleaner option is to make the deputy, an O-6, the director and down grade the civilian position to a 15....

149. Although (b)(6) & (b)(7)(C) responded that her proposal was "risky," Ms. Welch explained that she was not overly concerned because: [Ref (o), p. 35 of 16 Jan 00]

(1).. he's (b)(6) & (b)(7)(C) in personnel; and (2), he's the one that has to make the decision, not me. So if he thought it was risky, he had the option of talking Charlie [Nemfakos] into it, out of it, talking with (b)(6) & (b)(7)(C)]. It's not up to me.

150. Although Ms. Welch expressed no reservations about the concept of creating and abolishing a position to facilitate Dr. Nussbaum's prospective retirement, she was sensitive to the timing of the process. [Ref (o), p. 40 of 16 Jan 00]

I don't have a problem with the action. The problem may be with the time period that they tried to pull this off.

151. When asked how much time would have been acceptable, Ms. Welch stated "...had I been asked, which I wasn't, I would have said two to three months." [Ref (o), p. 40 of 16 Jan 00]

152. Ms. Welch's involvement with Dr. Nussbaum ended sometime in December 1999, when Mr. Nemfakos asked her the status of Dr. Nussbaum's departure paperwork. Mr. Nemfakos indicated that NAVINSGEN was involved, but did not ask Ms. Welch to halt the processing. Later the same day, Ms. Welch reported to Mr. Nemfakos that the personnel action concerning Dr. Nussbaum had not been completed. [Ref (o), pp. 4-6 of 24 Feb 00]

153. Ms. Welch stated that historically, Navy personnel rules were derived from the OPM's Federal Personnel Manual (FPM) and implemented by Navy instruction. The FPM was abolished several years ago and, according to Ms. Welch, there is no replacement beyond "some pieces of guidance" put out by OPM. The Navy now relies on the law, specifically Title 5 of the CFR, for determining rules regarding personnel issues. When asked about the provisions for obtaining a DSR as described in the OPM CSRS/ FERS Handbook for Personnel and Payroll Offices, Ms. Welch indicated that the handbook was merely "guidance," not a replacement for the FPM, and it did not carry the same authority for establishing policy:¹⁶ [Refs (o), pp. 13-14 of 24 Feb 00; and (jj)]

¹⁶ Nonetheless, SHHRO's letter to Dr. Nussbaum of 23 Nov 99 stated that he was eligible for DSR based on position abolishment in accordance with FPM 830-1. In the similar case of Ms. McNair, SHHRO's letter to her of 27 Sep 99 referenced the OPM CSRS/FERS Handbook.

If there were something in there that didn't work for us or we didn't agree with, we would, you know, directly confront OPM and say, this is what you may say in your handbook, however it says in the law, xyz.

154. Ms. Welch explained that OPM has been divesting itself of responsibilities for routine personnel actions: [Ref (o), pp. 11-12 of 24 Feb 00]

That means when I was growing up, the old Civil Service Commission and then the Office of Personnel Management was the bible. They told us how to do things. And then came this administration -- They threw everything out. They...still maintain the mantle, but DOD really does more human resources and civilian personnel policy management than OPM does. So they...got the title but they don't do a whole lot.

155. Ms. Welch conceded that although OPM no longer "approves" personnel actions, including DSRs, they probably have the authority to stop one, if they determine that it was improperly executed. [Ref (o), p. 13 of 24 Feb 00]

156. Ms. Welch also disputed an interpretation of an apparent proscription in Section 44, page 20, of the handbook against creating and then abolishing a position in order to facilitate a DSR: [Ref (o), p. 17 of 24 Feb 00]

It does not say that you can't create a position, put a person in it and abolish their job. At that point that person would be eligible for DSR.

When asked to explain her interpretation, Ms. Welch stated only that "it has been done historically." [Ref (o)]

"It's Done All the Time"

157. During the course of the investigation, a repetitive theme was the belief that creating and abolishing a job for purposes of DSR eligibility was done all the time in OSD. We pursued that issue with DOD officials.

158. (b)(6) & (b)(7)(C) Personnel and Security, DOD Washington Headquarters Services, stated that within DOD over the past several years, there have been various positions established and subsequently abolished, resulting in some employees leaving Government service under DSR. (The duration of those positions ranged from as short as 60-90 days to as long as 1-2 years.) [Ref (kk)]

159. In all cases, it is assumed that management creates legitimate jobs in the best interests of the Government and that there is a reasonable requirement that those jobs be accomplished at those particular times. Although management may anticipate a new position to be temporary, unless a not-to-exceed (NTE) date is established, the duration of the position potentially can be adjusted and may even be continued indefinitely, as in the case of any "permanent" position.¹⁷ [Ref (kk)]

160. (b)(6) & (b)(7)(C) is unaware of any instances in DOD of management's creating a permanent position with the sole intention of abolishing it to facilitate a DSR. She acknowledges that management may have established permanent positions knowing that it was likely that they might be terminated shortly thereafter and that the persons filling those positions might then have derived the benefit of a DSR. [Ref (kk)]

¹⁷ In neither Ms. McNair's nor Dr. Nussbaum's case did the personnel actions creating the GS-15 position reflect a NTE date. Accepting a position for such a defined duration would explicitly demonstrate voluntary separation.

161. (b)(6) & (b)(7)(C) stated that she is 6 years shy of being eligible for retirement and that if she were to voluntarily take a one year assignment, at the end of that year she would not be eligible for a DSR. [Ref (kk)]

162. On 1 March 2000, (b)(6) & (b)(7)(C) brought our concerns to (b)(6) & (b)(7)(C) Administration and Management, Office of the Secretary of Defense. (b)(6) & (b)(7)(C) stated that he and she are not aware of even one instance of an SES taking a voluntary downgrade to GS-15 for the purpose of facilitating a DSR. [Ref (kk)]

- OPM's Position -

163. NAVINSGEN investigators telephonically briefed (b)(6) & (b)(7)(C) Retirement Policy Division (Retirement and Insurance Service), OPM, and (b)(6) & (b)(7)(C), Senior Policy Advisor to (b)(6) & (b)(7)(C), on the findings of the instant investigation. They stated: [Refs (jj); and (ll), sections 44A1.1-1 and 44A2.1-8]

a. Chapter 44 of OPM's CSRS/FERS Handbook for Personnel and Payroll Offices contains the guidance applicable to the instant cases. (The title of chapter 44 is Discontinued Service Retirement.)

b. OPM accepts agency requests for DSR at "face value," and assumes that they are properly executed. If there is credible evidence that a position has been created solely to facilitate an employee's eligibility for a DSR, OPM is "required" to intervene and has "no choice" but to nullify the retirement and recover any retirement funds already paid.

164. NAVINSGEN investigators subsequently met with (b)(6) & (b)(7)(C) in her office to review OPM's file on Ms. McNair's retirement. During the course of that review, (b)(6) & (b)(7)(C), Washington Oversight Division, Office of Merit Systems, Oversight & Effectiveness, joined (b)(6) & (b)(7)(C) in discussing the instant investigation, as follows:¹⁸ [Ref (mm)]

a. (b)(6) & (b)(7)(C) stated that OPM's approval of a DSR is based on two documents. The first is the HRO letter notifying the employee of the determination of DSR eligibility, and the second is the agency's certification on OPM Form 1510 that documentation has been provided to OPM as required by the OPM CSRS/FERS Handbook for Personnel and Payroll Offices.

b. With just an abbreviated recounting of our findings of fact, and without being privy to the investigators' analysis and conclusions, (b)(6) & (b)(7)(C) spontaneously volunteered that OPM would likely pursue further investigation of this case upon completion of NAVINSGEN's inquiry. He indicated that his interpretation of the circumstantial evidence strongly suggested not only "prohibited personnel practice," but also "conspiracy to defraud the government."

c. (b)(6) & (b)(7)(C) opined that OPM's follow-on effort would probably include taking affidavits, revoking Ms. McNair's retirement, and bringing "pressure to bear" upon the Navy to sanction the culpable individuals. She further anticipated ultimate resolution of this matter by the Merit Systems Protection Board.

- DOD's Position -

165. (b)(6) & (b)(7)(C), Defense Civilian Personnel Management Service, stated that OPM requires DOD to follow its guidelines and has the authority to overturn a DSR, as well as any other type of retirement determination made within DOD. Chapter 44 of OPM's CSRS/FERS Handbook for Personnel and Payroll Offices sets forth the policy and procedures DOD uses for DSRs. DOD expects its subordinate agencies to comply with the OPM handbook,

¹⁸ During this meeting, OPM learned that it had incorrectly calculated Ms. McNair's retirement annuity, because it had used the 9 June 1974 SCD, vice the recomputed 24 September 1974 SCD. (b)(6) & (b)(7)(C) stated that OPM would take appropriate corrective action.

but formally issues only supplementary guidance. (b)(6) & (b)(7)(C) further stated: [Refs (jj); (nn), pp. 7 and 19-20]

[T]he concepts...in Chapter 44 were the concepts that were in the FPM [Federal Personnel Manual]. How you deal with a DSR has not changed...It was very clear, in terms of deregulation, that we would set policy and guidance once, and if it was sufficient to carry through the department and the defense agencies and military departments, then that's all we used. I don't know of any time where there is a misunderstanding of what OPM issue[s] is not what we should be following.

166. (b)(6) & (b)(7)(C) stated that creating a job for an employee with his or her agreement to take a downgrade so as to "receive a DSR out of it," is not consistent with OPM's guidelines. It is irrelevant whether or not the position that was created was a legitimate job. [Refs (jj); (nn), pp. 12-16; and (oo)]

This is not something that has changed...these have been the rules for a long time[;]...the case...where the personnel officer was removed for three cases of improper use of DSR clearly indicates that it's not common practice.¹⁹

...It takes three to five years to train somebody to understand all the rules associated with civilian personnel, and you have to know the intent of the rules and regulations which our business is founded on. If you're not providing the advisory services to the managers, then they can't possibly understand all of the nuances that are laid into the law and the implementing guidance.

...In terms of ...DSR, there is a reasonable approach to it...if you move somebody to a job and they do that job for a year, and that job goes away, that's a different situation. Or perhaps help facilitating management was what they would like to do, rather than moving somebody within 30 to 60 days and letting them go out the door. I have seen that kind of use of the system, but there is clearly a job requirement there that the person needs to do. In addition to that, it's not something that was created for that person specifically for the purpose of giving them a DSR.

I use the "year" as a rule of thumb because that is the time period in which you typically would not move anybody into a temporary assignment for any longer than a year. Once it's gone past a year, it's not really considered a temporary assignment. It is a permanent need of that organization, or at least a long-term need of that organization...You get into the interpretation there, so to me "timing" does make a difference. You clearly cannot tell the person, "Gee, if I move you here, I'm going to let you go." Then, yes indeed, you would smack up against the rules that say you just can't do that.

If you have a permanent employee going to do something for only a short period, regardless of whether it's a permanent or a temporary position, you indicate on th[e] SF50...it's a "temporary, not to exceed [NTE]," and you have a NTE date on it."

- Loss and Potential Loss to the Federal Retirement System –

167. At NAVINSGEN's request, HRSC Capital's Benefits Performance Branch (Code 43) computed estimated retirement benefits for Ms. McNair, as well as those that Dr. Nussbaum would have received, had he retired under a DSR rather than resigned. The computations did not include cost of living adjustments for inflation. [Ref (pp)]

a. The net annuity for Ms. McNair was estimated at \$44,388 per year. For the 17 year period prior to her reaching age 62, the total benefit will be \$754,596.

¹⁹ (b)(6) & (b)(7)(C) is referring to a case in which the MSPB upheld an agency's action to remove a civilian supervisor because of his involvement in 3 instances of improper DSRs. See reference (oo).

b. The net annuity for Dr. Nussbaum was estimated at \$55,848 per year. For the 6 year period prior to his reaching age 62, the total benefit would have been \$335,088.

Applicable Standards

168. Section 44A1.1-1 of OPM's CSRS and FERS Handbook for Personnel and Payroll Offices sets forth the following overview of DSRs: [Ref (jj)]

A discontinued service or involuntary retirement provides an immediate, possibly reduced, annuity for employees who are separated against their will...The final responsibility for determining whether a separation is involuntary for discontinued service annuity purposes rests with OPM. Whether a separation is voluntary depends on all the facts in a particular case; it is the true substance of the action that governs, rather than the methods followed or the terminology used.

169. Section 44A2.1-8 of OPM's CSRS and FERS Handbook for Personnel and Payroll Offices sets forth the following General Rule: [Ref (jj)]

A separation is not qualifying for DSR if the employee voluntarily leaves regular long-term (career) employment to accept a short-term appointment with full knowledge of its early termination.

170. Section 44A4.1-1 of OPM's CSRS and FERS Handbook for Personnel and Payroll Offices establishes OPM as the final authority for DSR determinations: [Ref (jj)]

A. General. The final responsibility for determining whether a separation is involuntary for discontinued service retirement purposes rests with OPM.

171. Discussion under General Principal #3 of OPM's Guidelines for Settlement of Federal Personnel Actions states:²⁰ [Ref (qq)]

...Under both CSRS and FERS, an employee can retire with an immediate annuity at age 55 if he or she has reached *both* age 55 and completed 30 years of service *before* separation for retirement. A settlement cannot legally provide that an employee who separated at age 53 with 30 years of service will begin to receive an annuity commencing at age 55. Under both CSRS and FERS, such individual may receive only a deferred annuity commencing at age 62.

...Under both FERS and CSRS, an employee who has been involuntarily separated for reasons not involving charges of "misconduct or delinquency" after reaching age 50 and completing 20 years of service, or after completing 25 years of service regardless of age, is entitled to an immediate annuity referred to as a Discontinued Service Retirement (DSR).

...Because OPM may approve a DSR only where an involuntary separation is involved, OPM will not approve a DSR application that is based on a separation that has been *voluntarily arranged*. That is, an employee and an agency cannot *agree* to create a scenario in which the agency prepares a personnel action purporting to reflect an involuntary separation on grounds not involving charges of misconduct or delinquency, with the intent that the facially involuntary, but actually voluntary, separation be used by the employee as the basis for an application to OPM for DSR. DSR requirements under CSRS and FERS mandate that an *involuntary* separation have occurred. An individual cannot voluntarily agree to an involuntary separation to obtain bogus eligibility for DSR.

172. 5 USCS § 2301 (Merit System Principles) states: [Ref (rr)]

²⁰ OPM has recently revised the language of this section, because it has determined that there are circumstances under which an agency and employee may agree to a settlement in which a proposed misconduct separation can be changed to a DSR-qualifying separation, if the agency believes the misconduct separation would be overturned by a court or administrative body. However, for purposes of this case, which does not involve misconduct or settlement agreements, the original guidance remains germane.

(b) Federal personnel management should be implemented consistent with the following merit system principles:

...

(4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.

(5) The Federal work force should be used efficiently and effectively.

173. The statutory basis for the Civil Service Retirement System (CSRS) is found in Chapter 83 of Title 5, United States Code. 5 USCS § 8336, "Immediate Retirement," sets forth the underlying statutory requirement that a separation must be "involuntary" in order to justify DSR retirement:²¹ [Ref (ss)]

(d) An employee who...is separated from the service involuntarily, except by removal for cause on charges of misconduct or delinquency ...after completing 25 years of service or after becoming 50 years of age and completing 20 years of service is entitled to an annuity.

174. Section 2635.702 of the Joint Ethics Regulation (JER), DOD 5500.7-R, "Use of Public Office for Private Gain," states:

(a) An employee shall not use or permit the use of his Government position or title or any authority associated with his public office in a manner that is intended to coerce or induce another person, including a subordinate, to provide any benefit, financial or otherwise, to himself or to friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity.

175. Section 6, Chapter 12, of the JER sets forth an ethical decision making plan, stating:

The following plan for decision-making ensures careful review of ethical consequences when there are alternative solutions that seem proper under existing laws and regulations. DOD employees should consider incorporating the following plan in official decision-making....

d. Eliminate Unethical Options. There may be solutions that seem to resolve the problem and reach the goal but which are clearly unethical. Remember that short term solutions are not worth sacrificing our commitment to ethics. The long term problems of unethical solutions will not be worth the short term advantages. Eliminate the unethical solutions.

²¹ 5 CFR 831 implements the statutes governing the Federal Retirement System, including the provision that DSRs must be based on involuntary separation.

Analysis

176. Ms. McNair and Dr. Nussbaum each participated with senior Navy officials in manipulating the civilian personnel system to make them eligible for retirement benefits, amounting to over \$1 million (the total of both cases), to which they were not rightfully entitled. The only substantial difference was that the DSR was accomplished in Ms. McNair's case and not accomplished in Dr. Nussbaum's case.

- Ms. McNair -

177. As stated in the Background section of this report, Mr. Panek downgraded Ms. McNair, at her request, to a GS-15 position. At that time, she was 3 months shy of the 25 years of Federal service she needed to make her eligible for a DSR. Given the mounting stress of her job and the imminent loss of her *au pair*, she was ready to resign in the event that she could not get a DSR. However, it was no secret that she was actively looking for a DSR, as evidenced by: her request that administrative support personnel identify her eligibility date; her discussions with Mr. Panek and Mr. Nemfakos, in which she expressed interest in getting a DSR; and her dialogue with (b)(6) & (b)(7)(C) over a possible job swap. She voluntarily accepted a downgrade, and according to MS. (b)(6) & (b)(7)(C), her friend and protégé, she knew the job would end in September or October 1999. She, therefore, voluntarily agreed to an involuntary separation to obtain bogus eligibility for a DSR.

178. Mr. Nemfakos asked Mr. Panek to assist Ms. McNair in leaving her SES position. Mr. Nemfakos then approved the creation of the GS-15 position for her, in spite of the ASN (FM&C) organizational freeze in effect at the time, knowing full well that she wanted to retire early, that she was close to having sufficient Government service to make her eligible for a DSR, and that the new position was clearly temporary. Mr. Nemfakos asserted that he was under the impression that the job would last approximately 6 months, and (b)(6) & (b)(7)(C) who supervised Ms. McNair in that job, estimated that it should have taken 6-9 months to complete the project. Mr. Nemfakos' apparent failure to question Ms. McNair's departure from the Federal Service well short of the 6-month period is inconsistent with his claim that Ms. McNair's new responsibilities would take over half a year to complete. Without Mr. Nemfakos' acquiescence, Ms. McNair's illegitimate DSR could not have been accomplished.

179. After unsuccessfully exploring a job swap between Ms. McNair and (b)(6) & (b)(7)(C) Mr. Panek resorted to the alternative of classifying a PD for a new position. In his words, he "was trying to find something productive for [an] employee that was having some difficulties to do." At that time, he was well aware of precisely the date when Ms. McNair would be eligible for a DSR, and he mentally projected the completion of the work assigned her in the temporary position to coincide with that date of eligibility. He conceded that other personnel on his staff could have accomplished the assigned work. To that extent, he was not using the Federal workforce efficiently and effectively in accordance with Merit System Principles described below. Given the circumstances described thus far, a reasonable person cannot accept as coincidental that Mr. Panek would suddenly propose Ms. McNair's DSR one workday following the day she acquired eligibility.

180. Mr. Panek, Mr. Nemfakos, and (b)(6) & (b)(7)(C) share accountability for the inefficient and ineffective use of the workforce in connection with Ms. McNair's special project. (b)(6) & (b)(7)(C) had already worked the project. Although the quality of the work product fell short of Mr. Panek's expectations, with specific guidance on how to improve the project, (b)(6) & (b)(7)(C) could probably have solicited the same input from senior level financial managers in the field that Ms. McNair solicited. Furthermore, creation of Ms. McNair's new position during an organizational freeze ran counter to the concept of long-range reduction in manning and increased efficiency of the workforce. (b)(6) & (b)(7)(C) had the experience and expertise to do the project on a part-time basis and wound up inheriting it when Ms. McNair retired. Although the project had the

attention of senior management, there obviously was no great sense of urgency to get it done, as evidenced by the 5 months that it languished in the wake of Ms. McNair's departure. Creating a full-time position for getting a project done, and then abolishing the position before the project was completed, was, at best, cavalier personnel management. More to the point, it was simply a case of SES personnel taking care of one of their own. In Mr. Panek's words, "I'm not going to be bashful about the fact that I was trying to find something productive for an employee that was having some difficulties to do."

181. Although (b)(6) & (b)(7)(C) signed the personnel action converting Ms. McNair from SES to GS-15, he did not intentionally participate in manipulating the personnel system. As a matter of policy, he left management of civilian personnel to his staff. When informed by investigators of the actual circumstances of Ms. McNair's departure, he was surprised and immediately grasped the potential for controversy.

- Dr. Nussbaum -

182. During the period of 8 to 23 November 1999, Dr. Nussbaum effectively worked only 6 days, due to the intervening Veterans' Day holiday, a compressed work day, 2 weekends, and 3 days of annual leave. Yet, on 23 November, the functions supposedly being performed by him as the Special Assistant were "no longer required." This wasn't even a carefully crafted sham. The DMOC project was ostensibly finished on 5 November 1999, and the residual fine-tuning of the product came as a result of questions posed by UNSECNAV on 10 November 1999. Furthermore, Dr. Nussbaum was not under the impression that he had any special duties as a result of the new position. He stated that nothing struck him "as particularly different" about the work he was doing on the DMOC project in October 1999 and the work he did on it following his assignment in November 1999 as special assistant to Mr. Nemfakos. Rather, he accepted it as simply a legitimate arrangement to facilitate his DSR. He presumed that Mr. Nemfakos was aware that he continued to perform his duties as Director, NCCA after the announcement that he was the Special Assistant for DMOC.

183. Mr. Nemfakos, however, would like us to believe that he vacated the NCCA Director's SES position so that Dr. Nussbaum could take a virtually completed project to another "level." Mr. Nemfakos not only describes that "level" in markedly broad and vague terms, but is unconvincing in his impression that Dr. Nussbaum was neither functioning as the NCCA Director nor accomplishing much ("obviously not much") as a Special Assistant on the project. On its face, such a situation would reflect a grossly "ineffective and inefficient use of the Federal workforce." Since there was no work product, it becomes convenient for Mr. Nemfakos to assert that the attempt to execute the tasking "became too hard." Most significantly, his explanation is not credible simply on the basis that Dr. Nussbaum disputes it. Additionally, (b)(6) & (b)(7)(C), the project manager, was unaware of any such tasking. Lastly, (b)(6) & (b)(7)(C) in whom Dr. Nussbaum confided, recognized immediately that the Special Assistant position was bogus, which is why it was kept secret from the rest of the NCCA staff.

184. The charade in the case of Dr. Nussbaum was more obvious than in the case of Ms. McNair and may explain Mr. Nemfakos' apparent reluctance to make it happen for Dr. Nussbaum. As well, Mr. Nemfakos, due to some apparent professional disappointment in Dr. Nussbaum and their "prickly" relationship, may not have been particularly inclined to do him a personal favor. However, as discussed above, the totality of the evidence suggests that Mr. Nemfakos was aware of the plan to facilitate Ms. McNair's retirement and condoned it. Therefore, it must have been self-evident to him that his organization had, the previous month, set a precedent by manipulating the personnel system to facilitate a DSR. Dr. Nussbaum communicated that precedent to (b)(6) & (b)(7)(C) and Ms. Welch, and in all likelihood, also to Mr. Nemfakos, who stated it was "entirely possible" that he did. As the deadline fast approached for Dr. Nussbaum to start work at Booz-Allen, his frustration mounted to the point that he confronted Mr. Nemfakos on 5 November 1999 and instantly prompted him to classify the PD and start the process to facilitate

the DSR. Given the moment of exasperation for Dr. Nussbaum, it is difficult to believe his testimony that he didn't recall whether on that occasion he mentioned Ms. McNair's case to Mr. Nemfakos. Regardless of the nature of the persuasion, Mr. Nemfakos personally participated in manipulating the personnel system by signing the paperwork.

185. Mr. Nemfakos was not served well by senior personnel managers. Ms. Welch suggested the idea of creating a position for Dr. Nussbaum and abolishing it, and her staff (b)(6) & (b)(7)(C) facilitated the process. Ms. Welch was obviously intimidated by Mr. Nemfakos, as evidenced by her statement that when he "jumps in the middle of something, a splash goes out; so when he jumps, you say, 'OK, whatever you need, Charlie.'" In interview, she quite clearly articulated her position that there is nothing wrong with "creating a job just to abolish it." She contends that creating and abolishing a position to facilitate a DSR is "done all the time," as if to say, "That makes it right." In Dr. Nussbaum's case, she would have preferred a plan to abolish the job "two to three months" after its creation, as if to suggest that a longer period would have made the scheme less obvious.

186. (b)(6) & (b)(7)(C) was impressively forthright in his testimony, stating that the creation of a position for the sake of abolishing it is not legitimate, and that he should have told Mr. Nemfakos that it was not the right thing to do in the case of Dr. Nussbaum. (b)(6) & (b)(7)(C) told Ms. Welch in an e-mail that her proposal was "risky in that it would be hard to say you did it for any reason but to allow him to retire." When someone of (b)(6) & (b)(7)(C) stature and experience in the world of personnel management advises that a plan is risky, the reasonable professional response would be to advise management to avoid executing such a plan. Particularly alarming is the fact that Ms. Welch, the most senior personnelist in the Department of the Navy, is not willing to concern herself with the ethical implications of a personnel action.

187. In spite of (b)(6) & (b)(7)(C) honesty, we hold him accountable for manipulation of the personnel system, as he told (b)(6) & (b)(7)(C) to proceed with processing the personnel action. (b)(6) & (b)(7)(C) and (b)(6) & (b)(7)(C) rationalized proceeding with the action on the basis that the DASN's office was comfortable with it.

- Regulatory Offenses -

188. Management officials violated 5 USCS § 8336, in that they effected, or attempted to effect, immediate retirements (with benefits) from Federal Service for ineligible employees. They entered into a scheme to make it appear that Ms. McNair and Dr. Nussbaum were involuntarily separated. In addition, Ms. McNair and Dr. Nussbaum each knew full well that their GS-15 special assistant positions were created only to facilitate their DSRs. They accepted those positions with undeniable expectations that they would soon thereafter be abolished.

189. Additionally, the scheme violated standards that OPM imposes on all Government agencies. OPM addresses the subject of DSRs both in its Guidelines for Settlement of Federal Personnel Actions and its CSRS/FERS Handbook for Personnel and Payroll Offices. Although the settlement guidelines discuss DSRs in the context of adverse personnel actions, the general principles set forth therein are consistent with the guidance provided in the CSRS/FERS Handbook. Both prohibit the approval of DSRs when the separation has been voluntarily arranged. Moreover, the Navy's submission to OPM is merely a certification of the employee's retirement application; OPM is the final DSR approval authority. Senior OPM and DOD personnel managers confirmed that this is the policy and emphatically refuted Ms. Welch's argument that OPM standards are intended to be merely "guidance." The combination of OPM documentation and expert testimony makes the governing agency's position clear, as underscored by the verbiage contained in General Principal #3 of the Settlement Guidelines:

An employee and an agency cannot agree to create a scenario in which the agency prepares a personnel action purporting to reflect an involuntary separation on grounds not involving charges of

misconduct or delinquency, with the intent that the facially involuntary, but actually voluntary, separation be used by the employee as the basis for an application to OPM for DSR.

190. In other words, “an individual cannot voluntarily agree to an involuntary separation to obtain bogus eligibility for DSR.” Yet, this was precisely the arrangement Ms. McNair and Dr. Nussbaum made with their respective supervisors. They were not only fully aware that Ms. McNair and Dr. Nussbaum were actively seeking departure from the Federal Service under terms favorable to themselves, but they proactively facilitated this process by creating, or attempting to create, unneeded positions. In reconciling the needs of the Navy with the desires of Dr. Nussbaum and Ms. McNair, they violated OPM standards.

191. Ms. Welch used her Government position to induce (b)(6) & (b)(7)(C), her subordinate, to take actions that, but for NAVINSGEN's intervention, would have provided Dr. Nussbaum with a benefit to which he was not entitled, in violation of Section 2635.702 of the JER. Although Ms. Welch contends that she had no authority in this matter, the fact remains that she was making a highly irregular exception to normal practice and had her immediate subordinate facilitate Dr. Nussbaum's DSR. Although (b)(6) & (b)(7)(C) did not directly provide Dr. Nussbaum the benefit, by acting under color of the DASN's authority, she convinced (b)(6) & (b)(7)(C) to certify the DSR eligibility and authorize the process that provided Dr. Nussbaum with the benefit. (b)(6) & (b)(7)(C) clearly shares accountability in this matter. More significantly, Ms. Welch interposed no objection when (b)(6) & (b)(7)(C) apprised her on 5 November 1999 that she would speak to (b)(6) & (b)(7)(C) “about expediting the action” to get two pay periods on the new PD so the action to abolish the position “[could] be effective as early as 12/5.” (The purpose of expediting the action was obviously to enable Dr. Nussbaum to leave Government in time to start his job at Booz Allen.) By Ms. Welch's tacit approval of that plan, she permitted the use of the authority associated with her public office in a manner that was intended to effect the DSR, again in violation of the JER cited above.

192. Ms. Welch's assertion, that her professional responsibility was limited to identifying the legal, and not the ethical, implications of Dr. Nussbaum's prospective retirement, is inconsistent with the JER. Section 6, Chapter 12 of the JER clearly stipulates that DOD employees should actively consider methods to eliminate unethical options in official decision making. Contrary to (b)(6) & (b)(7)(C) belief, the Navy had no obligation to develop a “win-win” scenario, favorable both to the Navy SES community and to Dr. Nussbaum. No one stood in the way of either Dr. Nussbaum or Ms. McNair simply resigning, if their personal circumstances so dictated, but it appears that no one suggested resignation as an alternative.

Conclusion

193. The allegations are substantiated.

References

- (a) NAVINSGEN ltr 990966 Ser N5/2038 of 1 Dec 99
- (b) Transcript of Interview with (b)(6) & (b)(7)(C) of 1 Dec 99
- (c) SF-52's ICO Sheryl M. McNair
- (d) Transcript of Interview with Sheryl McNair of 9 Mar 00
- (e) MFR of telcon with (b)(6) & (b)(7)(C) of 30 Mar 00
- (f) Transcript of Interview with Sheryl McNair of 6 Jan 00
- (g) Transcript of Interview with Robert Panek of 19 Jan 00
- (h) Transcript of Interview with Charles Nemfakos of 15 Feb 00
- (i) Transcript of Interview with Robert Panek of 2 Feb 00
- (j) Transcript of Interview with (b)(6) & (b)(7)(C), Jr. of 3 Feb 00
- (k) Transcript of Interview with (b)(6) & (b)(7)(C) of 31 Jan 00
- (l) Transcript of Interview with (b)(6) & (b)(7)(C) of 3 Feb 00
- (m) Documents converting Ms. McNair from the SES to GS
- (n) Transcripts of Interviews with (b)(6) & (b)(7)(C) of 19 Jan and 2 Feb 00
- (o) Transcripts of Interviews with Betty Welch of 16 Jan and 24 Feb 00
- (p) Documents abolishing Ms. McNair's GS-15 position/executing retirement
- (q) Transcripts of Interviews with (b)(6) & (b)(7)(C) of 2 Feb 00 and 23 Feb 00
- (r) (b)(6) & (b)(7)(C) Agency Certification (OPM Form 1510) of 22 Oct 99
- (s) Undated memo by Dr. Daniel A. Nussbaum concerning future employment
- (t) Transcript of Interview with Dr. Nussbaum of 9 Dec 99
- (u) Transcript of Interview with Charles Nemfakos of 16 Feb 00
- (v) DMOC Meeting Schedules
- (w) D. Nussbaum memo 5305 Ser NCCA/011-00 of 3 Nov 99 w/ e-mail of 2 Nov 99
- (x) Transcript of Interview with (b)(6) & (b)(7)(C) of 16 Feb 00
- (y) D. Nussbaum calendar for Nov 99
- (z) Summary of Sworn Testimony of Dr. Nussbaum of 1 Mar 00
- (aa) Documents re proposed conversion of Dr. Nussbaum from SES to GS
- (bb) Transcript of Interview with (b)(6) & (b)(7)(C) of 2 Dec 99
- (cc) E-mail re Dr. Nussbaum's employment status of 26 Aug 99 – 5 Nov 99
- (dd) Transcript of Interview with (b)(6) & (b)(7)(C) of 30 Nov 99
- (ee) Transcript of Interview with (b)(6) & (b)(7)(C), III of 6 Dec 99
- (ff) Transcript of Interview with (b)(6) & (b)(7)(C) of 6 Dec 99
- (gg) Transcript of Interview with (b)(6) & (b)(7)(C) of 28 Dec 99
- (hh) Transcript of Interview with (b)(6) & (b)(7)(C) of 16 Dec 99
- (ii) Documents re position abolishment/retirement/resignation ICO (b)(6) & (b)(7)(C)
- (jj) OPM CSRS/FERS Handbook for Personnel and Payroll Offices
- (kk) MFR re telcon with (b)(6) & (b)(7)(C) of 2 Mar 00
- (ll) MFR re telcon with OPM officials of 24 Feb 00
- (mm) MFR re review of OPM's retirement file ICO S. McNair of 3 May 00
- (nn) Transcript of Interview with (b)(6) & (b)(7)(C) of 25 Feb 00
- (oo) Hathaway v. GSA, U.S. MSPB, Docket No. DA-0752-92-0689-I-1 of 12 Mar 93
- (pp) HRSC computations of retirement benefits ICO Ms. McNair and Dr. Nussbaum
- (qq) OPM Guidelines for Settlement of Federal Personnel Actions
- (rr) 5 USCS § 2301
- (ss) 5 USCS § 8336

Chronology for Allegation #1 ICO Ms. McNair

Jan/Feb 99 Ms. McNair tells Mr. Panek she desires less stressful job. He helps her explore job swap with SES in Quantico whose command might relocate, allowing Ms. McNair an opportunity for a DSR.

29 Jan 99 At Ms. McNair's request, FMO, ASN (FM&C) re-computes her SCD which converts her DSR eligibility date to 24 Sep 99.

Apr/May 99 Ms. McNair tells Mr. Panek she wants to leave her SES position and stay home with her children; she tells Mr. Nemfakos she desires an early retirement. (Mr. Nemfakos is aware she's "relatively close" to being eligible for DSR.)

May/Jun 99 Mr. Panek tells USMC Fiscal Director that he is looking for some way to extend Ms. McNair's time in govt for a few months until she is eligible "for something."

May 99 Mr. Nemfakos approves creation of new position (GS-15) for Ms. McNair as an exception to the ASN (FM&C) organizational "freeze;" Mr. Panek starts formal process of recruiting Ms. McNair's replacement.

21 Jun 99 Ms. McNair sends memo to Mr. Panek voluntarily accepting downgrade to GS-15, effective 4 Jul 99.

22 Jun 99 Mr. Panek classifies GS-15 Special Assistant position for Ms. McNair; (b)(6) & (b)(7)(C) authorizes Ms. McNair's conversion from SES to GS-15.

1 Jul 99 Pursuant to ASN (FM&C) reorganization, (b)(6) & (b)(7)(C) and others are reassigned to Office of Budget (FMB) under Mr. Panek; commencement of 5-6 month Budget Review.

4 Jul 99 Ms. McNair commences her job in a telecommuting capacity as GS-15 Special Assistant to Mr. Panek; she is supervised by (b)(6) & (b)(7)(C) in assigning project work to Ms. McNair, Mr. Panek mentally projects the completion of her work to coincide with the date of her eligibility for a DSR; (b)(6) & (b)(7)(C) replaces Ms. McNair in her SES position.

24 Sep 99 Ms. McNair completes 25 yrs federal service, making her eligible (Friday) for DSR in the event her job is abolished.

27 Sep 99 Mr. Panek initiates action to abolish Ms. McNair's GS-15
(Monday) position, effective 9 Oct 99 (end of that pay period); SHHRO notifies Ms. McNair her position will be abolished no later than 30 Nov 99; Ms. McNair tells Mr. Panek she wants to leave her position "as soon as possible," because she is not happy in it.

9 Oct 99 Ms. McNair retires under DSR.

28 Oct 99 In retired status, Ms. McNair gives oral presentation of her GS-15 work product to DON Civilian Career Planning Board; Mr. Panek assigns unaccomplished portions of Ms. McNair's project to (b)(6) & (b)(7)(C) Enclosure
(1)

Chronology for Allegation #2 ICO Dr. Nussbaum

Approx. Dr. Nussbaum files conflict of interest memo with Counsel,
Feb 99 ASN (FM&C) regarding possible negotiation for employment with Booz-Allen & Hamilton.

Jul/Aug 99 Dr. Nussbaum tells (b)(6) & (b)(7)(C) that Booz-Allen agreed to employ him in Oct 99; tells Mr. Nemfakos he plans to leave govt service in 6-8 weeks and asks whether it is possible to get early-out; Nemfakos consults Ms. Welch regarding options.

14 Sep 99 Mr. Nemfakos tasks NCCA with DMOC/DHP study, to be completed by Oct 99.

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Nov 99 Ms. Welch tells Dr. Nussbaum her staff will “work” the action to effect his DSR.

3 Nov 99 Compilation of on-the-spot awards for NCCA analysts in recognition of completed efforts on DMOC study.

5 Nov 99 Dr. Nussbaum, (b)(6) & (b)(7)(C), and NCCA analysts brief Mr. Nemfakos on completion of DMOC study; briefing is interrupted while Dr. Nussbaum confronts Mr. Nemfakos over inaction regarding his request for a DSR; Mr. Nemfakos classifies GS-15 PD for Dr. Nussbaum to be Special Assistant for DMOC study; by e-mail (b)(6) & (b)(7)(C) informs Ms. Welch about plan to expedite action to abolish Dr. Nussbaum’s GS-15 position as early as 5 Dec 99.

8 Nov 99 By memo to Mr. Nemfakos, Dr. Nussbaum requests downgrade from ES-3 to GS-15.

11-17 Nov 99 Dr. Nussbaum on holiday, CWS, and annual leave.

23 Nov 99 By memo Mr. Nemfakos initiates action to abolish Dr. Nussbaum’s GS-15 position, effective 11 Dec 99 (2 days before Dr. Nussbaum starts work at Booz-Allen), stating “the functions being performed by the Special Assistant are no longer required....”

29 Nov 99 Complaint filed with NAVINSGEN.

10 Dec 99 Dr. Nussbaum resigns from federal service.

Enclosure (2)

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